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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To satisfy the Sherman Act's restraint of trade requirement, do plaintiffs who prove a mixed U.S.-foreign price fixing cartel have the option to show that cartel members or their agents made non-minimal sales in or into U.S. interstate commerce or engaged in other implementing acts here, or must plaintiffs separately prove the cartel's "substantial effect on U.S. commerce" whenever the scheme is judicially deemed to have been "primarily foreign"?

2. Assuming that proving a substantial effect on U.S. commerce is necessary even in cases involving price fixing by U.S. and foreign firms selling in interstate commerce through U.S. sales outlets, is the substantial effect issue subject to jury determination when multimillion dollar U.S. interstate sales by defendants of the relevant product are undisputed?

PARTIES TO THE PROCEEDING

Petitioners
Dee-K Enterprises, Inc.
Asheboro Elastics Corp.

Respondents
Heveafil Sdn. Bhd.
Filmax Sdn. Bhd.
Filati Lastex Sdn. Bhd.
Rubfil Sdn. Bhd.
Rubfil USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Dee-K Enterprises, Inc. and Asheboro Elastics Corp. state the following:

Dee-K Enterprises, Inc. has no parent company. Dee-K Enterprises, Inc. is not publicly held, and there is no publicly held company that owns 10% or more of its stock. Asheboro Elastics Corp. has no parent company. Asheboro Elastics Corp. is not publicly held, and there is no publicly held company that owns 10% of its stock.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (App. 1a-27a) is reported at 299 F.3d 281. The order of the U.S. District Court for the Western District of North Carolina denying Petitioners' motion for a new trial (App. 28a-31a), and the order of the district court entering judgment for Respondents (App. 32a-33a) are not published. The district court's bench rulings on jury instructions (App. 34a-38a) are not published.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT

This is a case where U.S. companies that purchased extruded rubber thread ("ERT"), a component of elastic,

from outlets in North Carolina secured a jury special verdict that the U.S. and Asian firms that sold them rubber thread met overseas and fixed the prices of that product, with intent to affect the U.S. market. App. 7a. It was undisputed that such firms sold large amounts of that product in U.S. interstate commerce, usually out of their own U.S. branches and subsidiaries. Respondents nevertheless convinced the trial court, over vigorous objection, that this Court's recognition in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), of the relevance of a "substantial effect on commerce" test in "foreign conduct" cartel cases required a jury finding of "substantial effect" in this case because it involved offshore price fixing meetings. In the trial court's view, the jury's negative verdict on the substantial effect question necessitated complete exoneration of the price fixers. The Fourth Circuit affirmed, on the novel rationale that regardless of the extent of U.S. activity in furtherance of a conspiracy, the balance of offshore versus U.S. conduct can require a substantial effects verdict. The issue thus remains whether the contested jury instructions and related special verdict form that allowed U.S. and foreign price fixers to escape all liability to their U.S. customers correctly stated the law of Sherman Act commerce jurisdiction.[1]

1. Petitioner Dee-K Enterprises, Inc. ("Dee-K") is a Virginia textile firm that bought extruded rubber thread from the North Carolina branches and subsidiaries of foreign-owned rubber thread producers. Dee-K and another U.S.

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[1] The opinion below speaks of jury instructions and special verdicts here not being overturned because not an abuse of discretion, App. 8a; but a significant error of law is always an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

firm, Asheboro Elastics Corp., brought suit against Malaysian, Indonesian, and Thai rubber thread producers, and the Malaysian firms' U.S. subsidiaries, seeking damages and injunctive relief for price-fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. App. 4a. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1337(a).

In their answer to the complaint, Respondents admitted the existence of their sales and sales outlets in the United States. The record showed that at least three of the respondents obtained licenses to do business in North Carolina. The two lead price fixers, Mr. Baba of Heveafil and Mr. Jayabalan of Rubfil, served as presidents of a U.S. branch and U.S. subsidiary, respectively. Mr. Baba and other price fixers such as Rubberflex imposed the cartel prices on their U.S. branches as retail prices. C.A. App. 2171, 2181, 2220. The agreed-upon prices were thus charged by Respondents to Petitioners and other customers in domestic transactions.

Two conspirators testified at trial in support of Petitioners' case, and they also provided minutes of the cartel meetings. Respondents chose to provide no witnesses or documents regarding the price fixing meetings. The jury found that each of the respondents did engage in a conspiracy aimed at fixing prices for ERT in the U.S. market. App. 7a.

The Fourth Circuit did not upset the jury's finding that Malaysian producers, later joined by producers from Indonesia and Thailand, met regularly between 1992 and 1995 in Asia to fix prices. As the appeals court summarized:

> Dee-K alleged (and proved to the jury) a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many *participants* with foreign affiliations but a few who also had United States

> affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States.

App. 10a. The opinion also acknowledges that the Malaysian respondents sold ERT through U.S. branches and subsidiaries, or directly to some U.S. customers, App. 6a, and secured higher prices in the United States during the conspiracy than before it. App. 6a-7a.

Other evidence of record at trial not noted in the opinion include that (i) undisputed Government data showed U.S. imports of over 59 million pounds of ERT during the cartel period (C.A. App. 3389), sold at increasing prices ranging from $1.10/lb. to $1.80/lb (C.A. App. 2152); (ii) respondent Heveafil's internal reports show that during 1994, the middle year of the cartel, Heveafil's U.S. sales exceeded $7 million and it made more profits in the United States than in any other country in which its ERT was sold. (C.A. App. 2185, 2177).

2. The parties were in sharp disagreement concerning jury instructions and need for special verdicts. Respondents were granted, over Petitioners' objection, instructions stating that the jury must find price fixing aimed at the United States, plus sales in U.S. interstate commerce, plus a substantial effect on U.S. commerce, which effect could not be presumed. Respondents also were granted, over objection, a set of special verdicts under which the jury, having found price fixing aimed at the United States, also had to find that such price fixing had a substantial effect on U.S. commerce. The basis for Respondents' position was this Court's observation in *Hartford Fire* that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796

(citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*")).

Petitioners objected that Respondents' interstate sales of the price fixed product out of their own U.S. outlets obviated the need for a *Hartford Fire/Alcoa* "substantial effect on commerce" instruction or verdict, and they submitted a brief relying on a line of rulings allowing plaintiffs to prove either restraint of interstate commerce or effect on commerce. Alternatively, Petitioners objected to inclusion of the word "substantial" in any effect test and to the trial court's refusal to tell the jury that minimal proof of effect will suffice in a case involving direct price fixing of goods sold in the flow of U.S. commerce. App. 36a-38a. Petitioners offered alternative instructions that included no effects test and instructed that Respondents' involvement in U.S. interstate ERT commerce was undisputed. Petitioners' proposed instructions were rejected, over objection.

The trial court instructed the jury as follows in regard to the commerce issue (C.A. App. 1352-53):

> Plaintiffs must also meet their burden of proving that the alleged agreement between the Defendants in fact produced a "substantial effect" on the U.S. market. A substantial effect in the United States cannot simply be assumed. Nor can a substantial effect in the United States be assumed to continue because it once existed. The Plaintiffs must prove that the substantial effect requirement is met at the relevant time.

Rather than disputing the volume of interstate sales, Respondents' counsel asked the jury to find no substantial effect on grounds that the Malaysian respondents' 1992 loss in a U.S. antidumping case and exposure to a 1994-95 latex price surge were the true causes of U.S. price increases even

if there was price fixing.[2] Thus instructed, the jury found no substantial effect on the United States, whereupon the trial court entered judgment in Respondents' favor, without allowing the jury to render a verdict on damages.

The five respondents who stood trial were relieved of liability due to the special verdict requiring a finding of substantial effect on commerce. App. 7a. (Some of the original defendants did not appear, and default judgments were entered against them.) One respondent and defendant below, Rubfil USA, was incorporated in North Carolina. A second, Heveafil Sdn. Bhd., sold in the United States through a North Carolina branch office headed by a managing director of the parent company. The other respondents and defendants at trial were Malaysian producers that sold ERT to U.S. customers through wholly owned U.S. subsidiaries. At least three respondents, including Heveafil, were licensed in North Carolina to sell ERT.

3. After trial, Petitioners moved for JMOL or a new trial, contending firstly that U.S. based firms are not entitled to *Alcoa* substantial effect instructions. Petitioners renewed their position that an effect verdict is not legally required where U.S. sales of the price-fixed product are undisputed. Petitioners also contended, as to the substantial effect issue, that the undisputed $50 million plus in imported ERT, combined with a 40% price increase over five years, and a

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[2] Respondents also contended that higher list prices set from abroad by cartel leaders were sometimes discounted in the United States, but the appeals panel did not seize upon that point, perhaps because of Petitioners' evidence (C.A. App. 2215-17) that higher prices were achieved more than 80% of the time. In any event, individual discounting from fixed prices is not a defense of Sherman Act liability. *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960).

more than 50% market share held by the price fixers, established substantial effect conclusively as a matter of law or fact, requiring that the jury's special verdict to the contrary be overturned. App. 7a, 28a. The trial court denied the motions, citing *Hartford Fire* as controlling authority justifying the instructions and necessitating a positive substantial effects verdict as a condition of liability. App. 29a.

4. On appeal, Petitioners argued that a *Hartford Fire* substantial effect instruction or finding is needed only for cartels that do not fix the prices of goods sold in U.S. interstate or import commerce, and is not available to cartels with U.S. participants who sell the products in U.S. markets. App. 15a. Further, Petitioners contended that the instructions and special verdict were unsound in not allowing Petitioners to prevail by either proving price fixing in commerce *or* price fixing that affected commerce. App. 8a.[3] Lastly, Petitioners contended that, even if a substantial effect test were applicable, the undisputed evidence as to Respondents' sales, market share and price increase figures, combined with the jury's finding of targeted price fixing, established substantial effect, and thus substantial effect was not an issue for the jury. App. 7a-8a n.1.

Respondents argued that the need for a substantial effect test arises whenever the price fixing meetings are held abroad, even if the fixed prices are charged by the conspirators' agents in the United States. App. 23a. In regard to the substantial effect test, Respondents contended

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[3] For this point, Petitioners relied on this Court's holding in *Continental Ore Co. v. Union Carbide Carbon Corp.*, 370 U.S. 690, 709 (1962), that it is reversible error to instruct a jury that a plaintiff can prevail only on one antitrust theory when the law allows a plaintiff to prevail on either of two theories.

that no legal presumption or conclusion of substantial effect was applicable when evidence of other causes of U.S. price increases was presented. App. 7a-8a n.1.

The court below, in deciding the substantial effects issue, expressly refused to follow the teaching of the Third and First Circuits that *Hartford Fire*'s test applies only when the cartel conduct is "wholly foreign." *See Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 52, 75 (3d Cir. 2000); *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997). The Fourth Circuit explained that the other courts of appeals "did not state or suggest the origin of the phrase 'wholly foreign.'" App. 16a.

The Fourth Circuit concluded that the proposition that the "substantial effects" test applies only to wholly foreign conduct was "severely undercut" by *Hartford Fire* itself for two reasons. First, this Court "*never* described the conduct before it as 'wholly' foreign." App. 18a. Second, "'wholly foreign' cannot be an appropriate characterization of the transactions at issue in *Hartford Fire* itself – which involved a refusal to sell to United States consumers." App. 17a. The Fourth Circuit expressly rejected Petitioners' contention that U.S. overt acts in furtherance of *per se* illegal price fixing obviate the need for a substantial effect test. App. 15a-16a. Claiming that "neither the statutory scheme nor the case law provides clear guidance" regarding standards governing "mixed" cartels involving U.S. and foreign actors and acts, App. 10a, the Fourth Circuit ruled that all participants in a mixed U.S.-foreign cartel are entitled to a substantial effect test whenever it is judicially determined that the scheme was "primarily foreign." App. 25a. The Court of Appeals then concluded that because most of the conspirators were foreign owned, the price-fixing meetings were held in Asia and prices were fixed in non-U.S. as well as U.S. markets, the scheme was "primarily foreign." App. 26a-27a. Without discussion of the more than $50 million in U.S. sales, or the

31 states in which Heveafil sold ERT (C.A. App. 2179), it concluded that the U.S. aspects of the conspiracy were "mere drops in the sea of conduct that occurred in Southeast Asia." App. 26a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Is Directly Contrary To This Court's Precedent

This Court held in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), that to satisfy the Sherman Act commerce requirement, a price-fixing plaintiff must "demonstrate by submission of evidence beyond the pleadings that the defendants' activity is itself in interstate commerce *or* . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce." 444 U.S. at 242 (emphasis added). The opinion notes that a substantial interstate market in price-fixed goods satisfies the in commerce test. The Court went on to stress that in a civil action under the Sherman Act, even a plaintiff who proves a conspiracy aimed at U.S. commerce that causes no measurable damage still proves all elements of the offense and is at least entitled to injunctive relief. *Id.* at 243. The opinion cites *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123-25 (1969), an international cartel case, for this proposition. *See* 444 U.S. at 243.

The *McLain* opinion nowhere holds, or in any way suggests, that proof of price fixing involving goods sold in U.S. interstate commerce is unavailing if the price fixers are foreign owned, or meet offshore, or fix prices for non-American markets also. The Fourth Circuit says, however, that the *Hartford Fire* reference to the *Alcoa* effects test limited *McLain*'s rule in this way. App. 14a. But the *Hartford Fire* comment should not be read as cutting back *McLain* to aid mixed U.S.-foreign cartels. The issue in *Hartford Fire* was comity, not the commerce requirements of

the Sherman Act. *Hartford Fire* did not deal with price fixing, or mention *McLain*, or opine whether plaintiffs there might have satisfied an "in commerce" standard as well as an "affecting commerce" standard.

The Fourth Circuit's treatment of mixed U.S.-foreign cartels is contrary to countless rulings of this Court. For instance, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962), the Court stated, "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." (citing *United States v. American Tobacco*, 221 U.S. 106 (1911); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927)). None of these cases suggests that it would be relevant to estimate the percentage of cartel activity that occurred abroad rather than in the United States. All hold that once it is proved that the conspiracy included products or services sold in the United States, the commerce inquiry is complete.[4] Plainly, when this Court in *Hartford Fire* referred to a "well established" substantial effect test, it was not suggesting a test whose scope would run afoul of so many precedents.

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[4] Section 1 of the Sherman Act states clearly that it bans conspiracies to restrain "trade or commerce among the several states *or* with foreign nations." 15 U.S.C. § 1. In 1982, Congress amended the Sherman Act to place a substantial effect test in the statutory text. That test, however, applies only to export commerce; Congress expressly excluded import commerce from the substantial effect requirement, and the law makes no mention of cases involving restraint of interstate commerce. Foreign Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a).

The opinion below concludes that because *Hartford Fire* mentions jurisdiction based on "some substantial effects" in a case that involved some counts that were not purely foreign, that opinion mandates an effects test in all primarily foreign cartel cases. App. 14a, 18a. Examination of the text further shows that this is a misreading of the intent of the Court's brief comments. The *Hartford Fire* opinion cites *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), *Matsushita Electric Industries v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Restatement of Foreign Relations Law § 415 (1987), and the Areeda treatise, *Antitrust Law*, as sources of the effects (or substantial effects) test. 509 U.S. at 796. None of these references supports the Fourth Circuit's ruling. *Alcoa* itself teaches that an effects test is unnecessary where territorial bases for jurisdiction exist, as where the cartel sent agents to the United States to commit acts in furtherance of the scheme. *See* 148 F.2d at 443. Further, *Alcoa* limits its rule only to firms owing no allegiance to the United States. The Fourth Circuit extends *Alcoa* rule protection to firms based or licensed to do business in the United States.[5] Where, as here, intent to affect the United States is proved, *Alcoa* does not require that plaintiffs establish a substantial effect on commerce, but rather puts the burden of showing no effect on commerce on defendants. *Id.* at 444.

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[5] The Areeda treatise, contrary to the Fourth Circuit, states that "foreign restraints . . . would not necessarily be immune when American firms participate in the restraint. . . ." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272e at 354 (2d ed. 2000). *See also United States v. Nippon Paper Indus., Inc.*, 62 F. Supp. 2d 173, 192-93 (D. Mass. 1999) (*Hartford/Alcoa* rule is for foreign firms).

In *Matsushita,* the defendants' lack of effect contention had been rejected at trial by Judge Becker, when he held that the issue was for the court, was easily satisfied and was unavailing where, as there and here, the foreign members of the cartel conspired with or directed U.S.-based firms, such as sales subsidiaries. *See Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1186 (E.D. Pa. 1980).

Restatement § 415(1) states that if "significant" (not predominant) aspects of the conspiracy occur in the United States, no effects test is necessary. Section 415(3) indicates that a substantial effects test is needed only where no acts in furtherance take place on U.S. soil. Restatement (Third) of Foreign Relations at 283 (1987). The Areeda treatise similarly states that even "incidental" U.S. events support territorial jurisdiction. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272(b) at 351 (2d ed. 2000).

The majority opinion in *Hartford Fire* noted that Sherman Act commerce jurisdiction was conceded, and then remarked that even the conduct of English corporations in England would meet an *Alcoa* effects test due to the aiming at the United States and the volume of commerce. 509 U.S. at 795-96. That comment in no way suggests that the Court would have barred plaintiffs from proving overt acts on U.S. soil as an alternative means of prevailing. Of course, the plaintiffs in the *Hartford Fire* litigation could not prove increased prices in U.S. interstate commerce, because *Hartford Fire* was a case about concerted refusal to sell. This case, by contrast, involves a jury finding of price-fixing of goods sold in U.S. interstate commerce, which the record shows were sold at increased prices.

Thus, the Fourth Circuit's decision rests on the dubious assumption that this Court has *sub silentio* weakened earlier, clear bedrock opinions on a key subject such as U.S. antitrust prosecution standards.

Essentially, the Fourth Circuit's balancing test between the U.S. and foreign aspects of a cartel uses an overbroad reading of the effects test to bring back the comity balancing test that was rejected in *Hartford Fire* itself. It is well settled that Congress intended its commerce power to be fully used, generally and in Sherman Act cases. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944)). The Fourth Circuit assumes that Petitioners proved enough to establish U.S. interstate commerce jurisdiction over the conspirators if all participants had been Americans who met locally. Use of its test, however, allows possible "jurisdictional" exoneration of price fixers over whom the United States clearly and admittedly had adequate territoriality jurisdiction, measured by U.S. constitutional standards or international law standards. The court below does not explain why U.S. plaintiffs have higher burdens of proof because of the foreign ownership of conspirators, or their choice to have offshore meetings or to direct price fixing at many nations. The Fourth Circuit balancing approach thus creates an unjustified surrender of wholly legitimate jurisdiction, something this Court declined to do in *Hartford Fire*.

Lastly, as Petitioners argued in their motions for new trial or JMOL, and later in their appeal to the Fourth Circuit, use of the *Alcoa* test at trial was particularly inappropriate because one of the five respondents found to have engaged in price fixing but exonerated on lack of substantial effect grounds was Rubfil USA, a company incorporated in North Carolina. All precedent teaches against such an extension of the *Alcoa* rule. The *Alcoa* opinion itself says that its rule applies when the antitrust laws are to be applied to persons "not in allegiance" to the United States. 148 F.2d at 443. The Areeda treatise likewise says that the foreign policy dangers that led to the *Alcoa* test are far less when a cartel

has American members. Areeda & Hovenkamp, *Antitrust Law* ¶ 272e at 354.

B. The Decision Below Is In Direct Conflict With Rulings Of Other Circuits And With Other Noted Authority

Prior to this case, the First and Third Circuits had been confronted with the question whether the substantial effect test recognized in *Hartford Fire* is applicable to schemes that restrained U.S. interstate commerce or involved overt acts in the United States. Both clearly ruled that it is not.

In *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), as here, the plaintiffs' case had been dismissed because of a factual finding that the scheme's effects did not meet the substantial effects test set out in *Hartford Fire*. The Third Circuit, adopting the *amicus* position of the Department of Justice, reversed.

The court framed the issue before it in terms that mirror the issue presented here (*id.* at 73):

> The defendants contend that the plaintiffs must demonstrate a "substantial effect on our domestic commerce to support the exercise of jurisdiction under the Sherman Act. They place primary reliance for this proposition on *Hartford Fire*.... By contrast, the Department of Justice, as *amicus curiae*, focuses on language in other cases that all the plaintiffs need show is that the restraint either interfered with the sale of rugs in interstate commerce or had a "not insubstantial" effect on interstate commerce to invoke Sherman Act jurisdiction.

The Third Circuit then definitively rejected the defendants' argument in terms that are flatly inconsistent with the holding of the Fourth Circuit in this case:

> We reject the Defendants' reliance on *Hartford Fire*, because it dealt exclusively with the extraterritorial

> applicability of the Sherman Act to wholly foreign conduct. . . . All the plaintiffs need demonstrate is "either that the defendants' activity is itself in interstate commerce or . . . that it has an effect on some other activity demonstrably in interstate commerce."

Id. at 75 (quoting *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980)).

Similarly, in *United States v. Nippon Paper*, 109 F.3d 1 (1st Cir. 1997), a price fixing case had been dismissed because the price fixed goods were first sold in Tokyo and no overt acts by defendants in the United States were alleged. The First Circuit reversed on the grounds that *Hartford Fire* allows jurisdiction over "*wholly foreign commerce*" that has an intended and substantial effect in the United States. *Id.* at 9 (emphasis added).

This case thus presents a direct conflict between the circuits. The Fourth Circuit's attempt to avoid this conflict is unavailing. The court speculates that *Carpet Group* and *Nippon Paper's* characterization of the *"Hartford Fire"* rule as applying to "wholly foreign" conduct might "simply have been a shorthand description" and could have been *dicta* in *Carpet Group* because the panel there found that the scheme was in fact primarily domestic. App. 17a-18a. The Fourth Circuit then goes on to confront the Third and First Circuits frontally, opining that if those circuits actually meant what they said, they have misread *Hartford Fire* because the *Hartford Fire* opinion never uses the phrase "wholly foreign conduct" and mentions the effects test in regard to a scheme that had some U.S. aspects (in some counts of the complaint). App. 18a. Review by this Court is necessary to resolve the conflict in the circuits and to provide guidance for the lower courts on the meaning of *Hartford Fire* when mixed U.S.-foreign cartels are challenged, something that happens frequently, in cases crucial to the U.S. economy.

The Fourth Circuit's opinion also fails to acknowledge that the American Bar Association's ("ABA") standard antitrust law treatise and other leading commentators support the position of the other circuits. The ABA treatise, *Antitrust Law Developments (Fifth),* describes *Alcoa* as holding that the Sherman Act reaches "agreements entered into *and consummated* outside the United States by foreign companies." The treatise further summarizes the holding as an "assertion [of Sherman Act jurisdiction] over *wholly foreign conduct.*" *Antitrust Law Developments* 1116-17 (American Bar Association, 5th ed. 2000) (emphasis supplied).

The Areeda and Hovencamp antitrust law treatise similarly states that jurisdiction over a foreign-based cartel "can generally be established simply by showing that the price fixing exists and that a substantial number of sales were made to United States buyers." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273 at 371 (2d ed. 2000).

The Fugate treatise, cited by the Fourth Circuit (App. 13a), says that the *Alcoa* test is needed for restraints "which are *not* in the flow of foreign commerce." 1 Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.12, at 82 (5th ed. 1996) (emphasis supplied). But the restraint in this case was price fixing of goods that were shipped directly to the United States in the flow of import commerce and then sold to plaintiffs, at elevated prices, in the flow of interstate commerce. The quoted language from Fugate thus supports plaintiffs' position regarding the applicability of the substantial effects test, not the Fourth Circuit's.

Seeking to deny that its novel jurisdictional "test" is unprecedented, the Fourth Circuit asserts that "courts have consistently required a showing of effect on United States commerce even in cases involving price fixing on imports." App. 21a. The opinion seeks to rely primarily on supposed facts of the Uranium Cartel litigation, *In re Uranium*

Antitrust Litigation, 617 F.2d 1248, 1254 (7th Cir. 1980), but it misstates and misperceives the facts of *Uranium*. App. 21a, 26a. In that case, U.S. law *prohibited* the purchase for domestic use of foreign uranium, in order to protect the domestic industry. *See In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1225 (Panel on Multidistrict Litigation 1978). Thus, there were no imports in the *Uranium* case, and an effects test was appropriate. The *Uranium* opinion cited by the panel actually notes that the plaintiff was not a direct purchaser from the conspirators. *See* 617 F.2d at 1263.

The opinion below also mentions *Nippon Paper*, but in that case, it was stressed that "[t]his case does not involve overt acts by co-conspirators occurring in the United States." *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 64 (D. Mass. 1996). Unlike in this case, the defendants in *Nippon Paper* included no U.S.-based firms, and defendants made no direct sales of the product at issue (fax paper) in U.S. commerce. In fact, neither *Uranium* nor *Nippon Paper imposed* an *Alcoa* test on plaintiffs. In *Uranium*, plaintiffs chose to rely on an effects theory. In *Nippon Paper*, the district court allowed the Government to try to prove either overt acts in U.S. commerce or effect on U.S. commerce. *See* 62 F. Supp. 2d 173, 183 n.29 (D. Mass. 1999). There is simply no support for the Fourth Circuit's jurisdictional rule in any prior precedent.

C. The Decision Below Will Have Pernicious Effects On The Enforcement Of U.S. Antitrust Laws Against Foreign And U.S. Firms That Meet Abroad And Form Cartels To Be Implemented By Their Agents In The United States

The Fourth Circuit's decision is an interpretation of the Sherman Act, and its principles are as applicable to government antitrust enforcement actions as they are to private antitrust suits. The court's decision to impose an

Alcoa burden on plaintiffs in mixed cartel cases is pernicious for both kinds of antitrust enforcement, for numerous reasons:

1. This case is the first decision to accord *Alcoa* rights to firms based or incorporated in the United States.
2. It is the first decision to accord *Alcoa* rights to foreign persons who conspire with firms based or incorporated in the United States.
3. It is the first decision to hold that firms that arrange multi-million dollar price fixes in the United States and in other countries are entitled to more favorable jury instructions than those who price fix only in the United States.
4. It accords foreign-owned firms based and licensed in North Carolina trial rights more favorable than those accorded to purely domestic price fixers.

Lastly, the Fourth Circuit's balancing test is costly and uncertain to apply and creates pressure to allow *Alcoa* instructions for all mixed conspiracies, lest the appellate court reach a different determination of whether the conspiracy is "primarily foreign" or "primarily domestic."

The problems of the balancing test are illustrated by the way the Fourth Circuit counted how many U.S. rather than foreign overt acts occurred. The Fourth Circuit apparently accepted Respondents' argument that the offshore price fixing meetings were virtually the only overt acts of the conspiracy, U.S. overt acts being described in the opinion as only one threat letter plus what are called "routine communications" (*i.e.*, price directives to U.S. outlets). App. 10a. But this ignores the well-settled legal rule that every sale at elevated prices during a price fix is an overt act in furtherance of that conspiracy:

> Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that

> brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again."

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b at 145 (rev. ed. 1995)).

Thus, in this case, in addition to price directives and threats, there were hundreds, perhaps thousands, of overt acts on U.S. soil. The two petitioners alone provided lists of over three hundred instances in which they were charged elevated prices by Respondents for interstate purchases of the price-fixed goods.

D. Assuming That A Substantial Effect Test Were Applicable, The Decision Below Ignores Clear Precedent That The Substantial Effect Of Price Fixing As To Any Product or Service Sold in Non-Minimal Quantity In Interstate Commerce Is Neither A Jury Question Nor Foreclosed By A Jury's Mistake

The opinion below further holds that the volume of imports or interstate sales (here, over $50 million) does not mandate a finding of substantial effect, but rather that the members of the cartel may escape liability by convincing a jury that other factors (*e.g.*, dumping law, cost increases) might have produced equally high prices. Further, the opinion below rules that such finding by a jury should not be overturned if supported by any evidence. App. 7a-8a n.1.

Petitioners contended in this case, as the United States has in many cases, that where there is no basis for disputing the existence of *non de minimis* interstate sales of the price fixed products, the Sherman Act commerce test is satisfied as a matter of law, and there is no role for a jury to play and no

reason for deference to a jury's mistake. Such rule is well settled.

This Court has held that $190,000 in commerce is substantial. *Fortner Enters. v. U.S. Steel,* 394 U.S. 495, 501-02 (1969). *See also Las Vegas Merchant Plumbers' Ass'n v. United States,* 210 F.2d 732, 748-49 (9th Cir. 1954) (where the jury finds price fixing of goods in commerce, the effect of such price fix is "plainly not for the jury to decide"); *accord Gough v. Rossmor Corp.*, 487 F.2d 373, 377 (9th Cir. 1973) ("The jury's erroneous answer to the jurisdictional interrogatory should have been ignored.") Judge Becker similarly ruled in the *Matsushita* case that the commerce test of jurisdiction is for "the court (not a jury)." *See Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1177 (E.D. Pa. 1980). *Accord Wirtz v. Lafitte*, 326 F.2d 856, 858-59 (5th Cir. 1968) (holding that it is error to assign the commerce issue to the jury when the effect on commerce is obvious). This Court has held that a supposed factual finding below of no effect on commerce should be reversed whenever the nature of the offense and the commerce makes effect on commerce inevitable. *Burke v. Ford*, 389 U.S. 320, 322 (1947). Similarly, the Areeda treatise states that:

> [O]nce the foreign cartel and actual imports into the United States are found, an effect on United States commerce can be presumed without proof of the amount by which output was reduced or price increased.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b at 372 (2d ed. 2000).

The substantiality question has been discussed in other cases. Judge Lynch of the First Circuit, concurring in *Nippon Paper,* stated that $7 million in sales, the alleged figure there, would certainly be substantial. 109 F.3d at 7. After the ensuing trial, Judge Gertner held that $7 million in annual sales was substantial, but that the plaintiffs were unable to show such sales volume in any year within the

five-year criminal antitrust statute of limitations. 62 F. Supp. 2d at 195. In contrast, the record in this case showed multimillion-dollar U.S. imports and resales in every year of the cartel, four of five of which years were within the four-year civil statute of limitations.

Here, it is undisputed that all respondents sold the price fixed goods in U.S. interstate commerce, that volume of sales exceeded $12 million per year or $60 million during the life of the conspiracy, that Heveafil's yearly interstate sales, in 31 states, exceeded $7 million in some years, and that prices were raised over 40% by agreement. The DOJ/FTC International Guidelines (1995) (cited by the Fourth Circuit at App. 22a) state that such facts would *ipso facto* meet any substantial effect test that was applicable. The Fourth Circuit thus erred in ruling that the commerce issue was properly submitted to the jury and that the district judge was right to defer to the jury's finding of no substantial effect.

To invite a jury to speculate on the substantiality of the effect of a $50 million U.S. price fix by firms with well over 50% of U.S. sales not only goes contrary to decades of cases holding that volume alone is enough, but also inherently imposes on victims of price fixing a burden the Court rejected in a classic international cartel case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). There the ruling was that the victim of a cartel has no duty to rebut all other possible causes of his damage. *Id.* at 114 n.9. Moreover, the argument of other causes should have gone only to damages, not to liability. *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232, 243 (1980). Lastly, once price fixing was found, the dumping compliance excuse went at most to motive, which is not a defense, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956), *United States v. United States Gypsum Co.*, 333 U.S. 364,

393 (1948), and had already been rejected twice earlier in the case.[6]

CONCLUSION

Enforcement of U.S. antitrust law against international cartels has expanded greatly, resulting in record U.S. law enforcement fines measured per case or per year. *See, e.g.*, Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust L.J. 711, 721 (2001). The author, the New York Assistant Attorney General for antitrust enforcement, notes that "enforcement includes not only criminal prosecutions but civil damage recoveries as well. Each has its own particular deterrent effect, of course." *Id.* at 731.

The pernicious effect of the Fourth Circuit's decision is not limited to private antitrust suits, as its principles would apply equally to hamstring government antitrust enforcement. Clearly, the Fourth Circuit ruling can create a major escape hatch from both Government and private anti-cartel cases, especially if followed by circuits that have not yet construed *Hartford Fire*.

The Fourth Circuit's repudiation of the *McLain* rule, conflict with other circuits and complication of effective enforcement against mixed U.S.-foreign international cartels highlight the need for review by this Court.

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[6] In a pretrial ruling made before the case was transferred to the Western District of North Carolina, Judge Ellis rejected two dismissal motions from the Malaysian respondents based on dumping law compliance, noting *inter alia* that U.S. dumping law does not require coordinated or identical pricing and is irrelevant where, as here, a majority of the defendants were from countries that were not subject to any antidumping order. *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1155-57 (E.D. Va. 1997).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEE-K ENTERPRISES, INCORPORATED, a corporation of the Commonwealth of Virginia; ASHEBORO ELASTICS CORPORATION, a corporation of the state of North Carolina, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

HEVEAFIL Sdn. Bhd; FILMAX Sdn. Bhd; RUBFIL Sdn. Bhd; FILATI LASTEX Sdn. Bhd, corporations of Malaysia; RUBFIL USA, INCORPORATED, a corporation of the State of North Carolina, No. 01-1894

Defendants-Appellees,

and

RUBBERFLEX Sdn. Bhd; FILATI LASTEX ELASTOFIBRE USA, INCORPORATED, a corporation of Rhode Island; FLEXFIL CORPORATION OF RHODE ISLAND, a corporation registered to do business in North Carolina; FLEXFIL CORPORATION, a corporation of the state of North Carolina; Pt BAKRIE RUBBER INDUSTRIES; Pt PERKEBUNAN III, corporations of Indonesia; NATURAL RUBBER THREAD COMPANY, LIMITED; LONGTEX RUBBER INDUSTRIES COMPANY, LIMITED, corporations of Thailand; CONSORTIUM INTERNATIONAL CORPORATION, a

corporation of the state of Texas; JPS ELASTOMERICS CORPORATION, a corporation of the state of Delaware,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

Graham C. Mullen, Chief District Judge.

(CA-98-10-3-MU)

Argued: May 7, 2002

Decided: July 30, 2002

Before WILKINS and MOTZ, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wilkins and Senior Judge Michael joined.

COUNSEL

ARGUED: Joel Davidow, MILLER & CHEVALIER, CHARTERED, Washington, D.C., for Appellants. Christopher M. Curran, WHITE & CASE, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** Alan I. Horowitz, Michael T. Brady, MILLER & CHEVALIER, CHARTERED, Washington, D.C.; William T. Rikard, Jr., PARKER, POE, ADAMS & BERNSTEIN, L.L.P., Charlotte, North Carolina; Daniel Small, Mary Strimel,

COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C., for Appellants. J. Mark Gidley, Jaime M. Crowe, Eric Grannon, WHITE & CASE, L.L.P., Washington, D.C., for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Two United States companies that purchase rubber thread brought this private antitrust action, alleging a price-fixing conspiracy led by Southeast Asian producers of the thread. After an eight-day trial, the jury returned a special verdict, finding that although one or more of the producers engaged in a conspiracy to fix prices that was intended to affect United States commerce, that conspiracy had no "substantial effect" on this country's commerce. The district court then entered judgment on the verdict for the producers. The purchasers appeal, principally contending that the substantial-effect test applies only to "wholly" foreign conduct, and so does not govern this case because the rubber-thread conspiracy resulted in the sale of price-fixed goods directly into the United States. Because the conspiracy involved primarily foreign conduct, we hold that the district court did not abuse its discretion in applying the substantial-effect test. Accordingly, we affirm.

I.

In 1997, Dee-K Enterprises, Incorporated, and Asheboro Elastics Corporation (collectively Dee-K), United States corporations that purchase rubber thread to make elastic fabric, brought this class action, alleging a conspiracy to fix

the price of rubber thread in the United States, in violation of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Rubber thread, also called extruded rubber thread or elastic rubber thread, and sometimes abbreviated as "ERT," is manufactured in Southeast Asia and used to make elastic fabric, bungee cords, toys, and other products.

Dee-K named as defendants nine Southeast Asian producers of rubber thread and some of their subsidiaries and distributors in the United States. Five of the producers are Malaysian companies: Heveafil Sendirian Berhad, Filmax Sendirian Berhad, Rubfil Sendirian Berhad, Rubberflex Sendirian Berhad, and Filati Lastex Sendirian Berhad. (The suffix "Sendirian Berhad," used in Malaysia and abbreviated "Sdn. Bhd.," translates as "private limited company.") Two are Indonesian: PT. Bakrie Rubber Industries and PT. Perkebunan III. Two are Thai: Longtex Rubber Industries Company, Limited, and Natural Rubber Thread Company, Limited. Dee-K also named as defendants the United States subsidiaries of three Malaysian producers (Rubfil USA, Incorporated, Flexfil Corporation of Rhode Island, Flexfil Corporation, and Filati Lastex Elastofibre USA, Incorporated) and two United States independent distributors used by other producers (Consortium International and JPS Elastomerics).

In its complaint, Dee-K alleged that the members of the class it sought to represent, domestic purchasers of rubber thread, paid "artificially high and non-competitive prices" for rubber thread, that they "were deprived of free and open competition in the market" for rubber thread, and that "competition among defendants" in the United States sale of rubber thread "was restrained." As to injury, Dee-K contended that "plaintiffs . . . purchased substantial quantities of extruded rubber thread from defendants."

Dee-K originally filed this action in the Eastern District of Virginia. Following a number of early rulings not relevant to our disposition of this appeal, the district court determined that venue did not lie in Virginia and transferred the case to the Western District of North Carolina. *See Dee-K Enters. v. Heveafil Sdn. Bhd.*, 985 F. Supp. 640 (E.D. Va. 1997). Prior to trial, that court denied class certification. After most defendants settled, declined to appear, or were dismissed, the case against the five Malaysian producers and the United States subsidiary of one of them (Rubfil USA), none of whom now contest personal jurisdiction, *see Dee-K Enters. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376 (E.D. Va. 1997), proceeded to trial before a jury.

Dee-K introduced substantial evidence at trial of horizontal price fixing among the producers. This price fixing apparently originated at least in part in reaction to 1991 threats by the United States government to punish Southeast Asian rubber-thread producers for violating antitrust prohibitions against "dumping." "Dumping" occurs when a foreign producer injures a United States producer by selling a product in the United States at less than what would be "fair value" in the foreign producer's home market. *See* 19 U.S.C.A. § 1673 (West 1999) (authorizing an "antidumping duty"). The United States Department of Commerce may impose tariffs on dumpers to bring the United States price into line with the price in the producer's home market. *See id.* Thus, if a product sells for $1 in the home market, it warrants dumping duties if it sells for less than $1 in the United States. Of course, avoidance of dumping penalties in itself does not provide foreign producers with a license to fix prices in violation of United States antitrust laws. Although to avoid dumping a company must price goods at or above the price in its own home market, it may not agree with its competitors to fix prices,

restricting the market movement of prices in the United States market. *See Dee-K Enters. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1156 & n.45 (E.D. Va. 1997); *see also United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 180 (D. Mass. 1999) (noting that foreign companies threatened with anti-dumping provisions must "walk a fine line").

In December 1991, responding to the dumping accusations, officials of the Malaysian producers representing Heveafil, Rubfil, Rubberflex, and Filati Lastex met with a Malaysian government official and agreed to fix rubber-thread prices throughout the world. Later joined by other rubber-thread producers from Malaysia, Indonesia, and Thailand, they continued to meet for several years, at conventions and in other settings, to discuss and implement these and other efforts to fix prices. They met regularly between 1992 and 1995 -- in Kuala Lumpur, in Columbo, in Bali, and in Penang. They never met in the United States.

Throughout the period during which they met to fix prices, the Malaysian producers sold their rubber thread around the world, distributing it to the United States market in three different ways. Heveafil and Filmax sold to the United States through a division of Heveafil based in the United States. Rubfil, Rubberflex, and Filati Lastex all sold to large United States customers directly and to smaller customers through wholly owned subsidiaries incorporated in the United States, all four of which were named as defendants. *See Dee-K*, 982 F. Supp. at 1142. The record does not disclose the United States share of the global market.

From 1991 to 1996, United States prices for rubber thread (adjusted for inflation using the producer price index) generally rose, with some decreases on various scales. Dee-K attributes these increases to the price-fixing conspiracy. The producers attribute them to an antidumping order entered by the United States Department of Commerce in

1992 that imposed a duty on rubber thread and to increases in the price of raw materials, particularly the price of latex.

At the conclusion of an eight-day trial, the district court submitted a special verdict form to the jury. The verdict form included two questions: (1) Was there "a conspiracy . . . to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States"? (2) If so, did "the conspiracy have a substantial effect in the United States"?

The jury answered the first question in the affirmative, finding a conspiracy to fix prices with the intent of affecting the United States. But the jury answered the second question in the negative, finding that the conspiracy did not have a substantial effect in the United States. In accordance with this verdict, the court entered judgment for the producers.

Dee-K moved for a new trial pursuant to Rule 59, arguing that the jury's verdict as to the lack of a substantial effect on United States commerce was contrary to the weight of the evidence. The district court denied the motion and simultaneously denied a late-filed Rule 50 motion for judgment as a matter of law on the substantial-effect question. Dee-K appeals, contending that the substantial-effect test (at least as stated in the jury instructions and special verdict) does not govern this case.[1]

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[1] Dee-K does not appeal the denial of its Rule 50 motion. It does, however, appeal the denial of its motion for a new trial, asserting that the jury's finding of no substantial effect was against the weight of the evidence. In fact, the producers provided the jury with a good deal of evidence supporting the challenged finding, including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases. Given these alternatives, nothing about this case presents the "exceptional circumstances" that might lead us to conclude that the verdict was against the weight of the evidence. *See*

(footnote continued on next page)

II.

In *Hartford Fire Insurance Co. v. California*, the Supreme Court noted that "it is well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 796 (1993) (citations omitted).

Dee-K argues that this statement in *Hartford Fire* does not govern the case at hand, primarily because the price-fixing conspiracy it proved does not constitute "foreign conduct." Dee-K contends that instead the jurisdictional test used in domestic antitrust cases controls here; in domestic cases a plaintiff need only demonstrate "that the defendant's activity is itself in interstate commerce, or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce." *See McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980) (emphasis added and citation omitted). Accordingly, Dee-K asserts that the district court abused its discretion by applying the substantial-effect test from Hartford Fire. *See Nelson v. Green Ford, Inc.*, 788 F.2d 205, 208-09 (4th Cir. 1986) (noting that we review jury instructions for abuse of discretion); *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir. 1976) (noting that we review special verdict interrogatories for abuse of discretion).

The producers respond that *Hartford Fire* is "analytically indistinguishable" from Dee-K's case. Thus, they maintain that the district court correctly applied *Hartford Fire* when it

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(footnote continued from previous page)
Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 186 (4th Cir. 1994 (citation omitted); *see also Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989); *see generally* 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2819 (2d ed. 1995 & Supp. 2002).

required Dee-K to show a "substantial effect in the United States" before concluding that "the Sherman Act applies" to the "foreign conduct" that Dee-K alleged.

The mixture of foreign and domestic elements in this case makes its analysis challenging; either an entirely foreign or an entirely domestic conspiracy would present a comparatively easy jurisdictional question. If the conspiracy had involved participants with United States affiliations, acting only in the United States, and targeting a United States market, the jurisdiction of United States courts would be clear, without any proof of effect.[2] At the other extreme, if everything about the conspiracy were foreign -- if it were a conspiracy formed in Southeast Asia, by Southeast Asian persons and corporations, intended to affect only Southeast Asian markets, and affecting only those markets -- the Sherman Act would not provide a United States court any jurisdiction to address it. *See Matsushita Elec. Indus. v.*

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[2] We recognize that the Ninth Circuit has suggested that the foreign-conduct question affects the substantive analysis of a particular offense under the antitrust laws. *See Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996). Although market effect of course has its place in substantive antitrust analysis, we follow the Supreme Court and Congress in treating allegations that an antitrust case involves only foreign conduct as raising a jurisdictional issue. *See* 15 U.S.C.A. § 6a (West 1997) (addressing the presence of certain types of foreign conduct in an antitrust case by providing that the Sherman Act does not apply to such cases at all); *Hartford Fire*, 509 U.S. at 795-96; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 415, reporter's note 3 (1987) ("[A]ccurate analysis distinguishes between the requirement of sufficient effect on commerce of the United States to support application of United States law, and the requirement of sufficient injury or anticompetitive effect to establish liability."); Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.14 at 16 (Supp. 2002) (criticizing the Metro Industries court on this point); IA Philip Areeda & Herbert Hovenkamp, Antitrust Law § 273 (2d ed. 2000) ("[W]e emphasize that 'jurisdictional' and 'substantive' inquiries are not wholly independent.").

Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies.").

We earn our keep, of course, in the middle ground between such extremes -- in cases such as this. Dee-K alleged (and proved to the jury) a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many *participants* with foreign affiliations but a few who also had United States affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States. This sort of mixed fact pattern will probably become increasingly familiar as global economic links and assertions of transnational jurisdiction increase. *See generally* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289, 290-92. But this is one of the few cases to date that involves an import market and presents such a mixed fact pattern, and neither the statutory scheme nor the case law provides clear guidance.

Although the Supreme Court noted in *Hartford Fire*, 509 U.S. at 796, that the substantial-effect test applies to "foreign conduct," no antitrust statute defines "foreign conduct." Nor does any statute explicitly address any aspect of a case involving the effect of foreign conduct on United States *import* commerce, like that at issue here.

To be sure, Congress legislated in this area relatively recently, establishing a threshold jurisdictional standard for "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign

Trade Antitrust Improvements Act (FTAIA) of 1982 § 402, Pub. L. 97-290, 96 Stat. 1246 (codified at 15 U.S.C.A. § 6a). According to that statutory standard, United States antitrust laws do not apply to such conduct unless it has "a direct, substantial and reasonably foreseeable effect" on United States commerce. *Id.* Because this case involves importation of foreign-made goods, however -- conduct Congress expressly exempted from FTAIA coverage as "involving . . . import trade or import commerce . . . with foreign nations," *id.* -- the FTAIA standard obviously does not directly govern this case, even though it may constitute an effort to "clarify the application of United States antitrust laws to foreign conduct" in other circumstances.[3] *See Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001); *Hartford Fire*, 509 U.S. at 796 n.23 (refusing to decide whether the FTAIA applies to the conduct alleged, an agreement between foreign and United States participants, formed abroad, to refuse to sell a service to United States consumers); *see also id.* (refusing to decide whether the FTAIA's "direct, substantial, and reasonably foreseeable effect" provision "amends existing law or merely codifies it"); *Kruman v. Christie's Int'l P.L.C.*, 284 F.3d 384, 399 n.5 (2d Cir. 2002) (same). Nor do we find any guidance in the FTAIA as to what constitutes "foreign conduct."

We thus must rely on case law, which provides some, albeit limited, assistance. Only a few cases give any hint of how to decide whether conduct is foreign.

In cases that date from the early twentieth century, silence on this point is hardly surprising, because the Supreme Court then rejected any exercise of jurisdiction based only on acts committed abroad, on the theory that the law of the country

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[3] Not even the producers suggest that we should, by analogy or otherwise, borrow the FTAIA standard in this import case.

where an act occurred should govern it. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909); IA Areeda & Hovenkamp § 272b at 350-51 (describing post-American Banana Supreme Court cases in which jurisdiction depended on finding "actions within the United States").

In 1945, a leading opinion by Judge Learned Hand, which the Supreme Court later endorsed, displaced this approach based on the location of the conduct, and shifted attention to the location of the conduct's actual or intended effect. *See United States v. Aluminum Co.* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945); IA Areeda & Hovenkamp § 272c; I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.10 at 68-69 (5th ed. 1996). The case, Alcoa, thus introduced a predecessor of Hartford Fire's effects test. Although Alcoa refocused the jurisdictional analysis on the location of the effects of alleged violations of the antitrust laws, it did not eliminate the location of the conduct from the inquiry entirely, since its test applied only to cases involving foreign conduct.[4] *See, e.g.*, *Kruman*, 284 F.3d at 393-94 ("Under [*Alcoa*'s] . . . 'effects test,' *foreign conduct* was actionable under our antitrust laws if it was intended to affect domestic commerce and actually did so." (emphasis added)). Yet *Alcoa* does not discuss how to assess whether conduct is "foreign," rather than domestic and therefore subject to *McLain*'s test.

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[4] After *Alcoa* as before, a wholly domestic antitrust case does not necessarily require any proof of an effect on commerce. *See, e.g.*, *Fed. Trade Commas v. Superior Ct. Trial Lawyers Assn*, 493 U.S. 411, 432-36 (1990) (expounding on the rationale for per se antitrust rules that create a presumption of effect in many cases); *McLain*, 444 U.S. at 242 (explaining that antitrust jurisdictional requirements in a domestic case may be satisfied by a showing that "the defendants' activity" of any magnitude "is itself in interstate commerce").

In the decades after *Alcoa*, courts and commentators analyzed not how to assess whether conduct is foreign, but how to interpret and apply *Alcoa*'s effects test. They disagreed as to whether antitrust jurisdiction over foreign conduct requires both "an effect" on United States commerce and an "intent to affect United States commerce," or just effect or just intent, and as to the magnitude of any effect. *See, e.g.*, *Matsushita*, 475 U.S. at 582 n.6 (characterizing the Sherman Act as "reach[ing] conduct outside our borders, but only when the conduct has an *effect* on American commerce") (emphasis added)); Restatement (Third) of Foreign Relations Law § 415 (concluding that the Sherman Act applies to a foreign-made agreement with "a principal purpose . . . to interfere with the commerce of the United States" and "some effect on that commerce" and to other foreign-made agreements with a "substantial effect" on United States commerce if "the exercise of jurisdiction is not unreasonable"); Fugate § 2.12 at 82 (proposing "the 'direct and substantial' [effect] test, plus an element of intent" where "U.S. jurisdiction is based upon acts or agreements abroad which are not in the flow of foreign commerce" (emphasis omitted)); *id.* § 2.5 at 56, § 2.8 at 62 (suggesting and citing authority for a requirement of a "substantial effect"); IA Areeda & Hovenkamp § 272a at 350, § 272f at 354 (describing a minimal requirement of "significant effects"); *see also Den Norske Stats Oljeselskap*, 241 F.3d at 423-24 & n.12 (describing the "general [ ] disagree[ment]," "assorted tests," and "confusing and unsettled" federal case law governing "the extraterritorial reach of the antitrust laws" before (and after) *Hartford Fire*. In promulgating these variants on the effects test, however, the authorities do not explore how to define "foreign conduct" in deciding whether to apply an effects test at all.

Although *Hartford Fire* itself does not discuss how to define "foreign conduct" either, it gives us some guidance by characterizing certain conduct as foreign. The complaint in *Hartford Fire* alleged multiple, partially overlapping conspiracies among reinsurers and their insurers (that is, insurers of reinsurers, also known as providers of retrocessional insurance) to limit the kinds of policies written for general corporate coverage in the United States market. *See* 509 U.S. at 770-78. Three counts specifically alleged that companies in London agreed among themselves to refuse to reinsure policies covering the United States market unless the policies contained certain restrictions on liability. Two of these alleged conspiracies involved only international participants, *see id.* at 776, 778 & n.7, but one involved both international and United States participants. *See id.* at 775-77.

It was in its discussion of these three counts that the *Hartford Fire* Court stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. The Court thus plainly characterized the three counts it was then considering (including the count involving conspirators based in the United States) as "foreign conduct," but did not further define the term. The Court did not explain whether or how it had weighed the national affiliation or affiliations of the violators, the location of their acts, the location of the target market, or some combination of these factors in determining that the counts involved "foreign conduct."[5]

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[5] Nor, as Dee-K notes, did the Court resolve whether the Sherman Act might also apply to foreign conduct (however defined) that meets some lesser standard -- that is, whether intent alone, substantial effect alone, or some "effect" less than "substantial" coupled with intent might suffice.

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Dee-K seeks to rely on the *Hartford Fire* Court's silence on these issues to argue that it need not satisfy the substantial-effect test described in *Hartford Fire*. Specifically, Dee-K maintains that, even if the *Hartford Fire* statement does set forth minimal requirements for antitrust jurisdiction over foreign conduct, those requirements govern only antitrust violations involving "wholly" foreign conduct -- and do not govern foreign conspiracies that result in the sale of price-fixed goods directly into United States commerce. Meanwhile, the producers argue that *Hartford Fire* directly controls here, without acknowledging any distinctions between the two cases. They insist that the only relevant consideration in assessing whether conduct is foreign is the location of actual conspiratorial meetings. We

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Instead, the Court stated that the Sherman Act *does* apply to foreign conduct when intent and substantial effect exist, without explicitly excluding the possibility of jurisdiction in other circumstances. 509 U.S. at 796; *see also* IA Areeda & Hovenkamp § 273. (Indeed, the parties presented no jurisdictional issue to the Court in *Hartford Fire*; rather, the defendant reinsurers "concede[d] "jurisdiction, but contended that "the District Court should have declined to exercise such jurisdiction under the principle of international comity." 509 U.S. at 795-97.)

However, we need not decide whether the *Hartford Fire* formulation is the only test for jurisdiction in antitrust cases involving foreign conduct, because Dee-K has waived this argument by failing to pursue it in the district court. Dee-K now contends that the district court should have applied a test drawn from the Restatement (Third) of Foreign Relations Law § 415(2), permitting a lesser effects test if the intent to affect the United States was a "principal purpose" of the conduct -- but Dee-K never so much as mentioned a "principal purpose" requirement in the district court, nor objected to the jury instructions or special verdict form on this basis. Never having proposed its theory or alternative test to the district court, Dee-K cannot prevail on this argument on appeal.

ultimately reject both sides' rigid views of Hartford Fire and apply a more nuanced analysis.

A.

We begin with Dee-K's contention that the standard set forth in *Hartford Fire* does not govern this case because the conduct at issue here is not foreign enough. Dee-K offers two arguments in support of this contention. Neither is persuasive.

First, Dee-K relies on the fact that two of our sister circuits have characterized *Hartford Fire* as involving "wholly foreign" conduct. *See Carpet Group Intl v. Oriental Rug Importers Assn*, 227 F.3d 62, 75 (3d Cir. 2000); *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997). Dee-K maintains, in line with this characterization, that *Hartford Fire* does not govern a conspiracy like that at hand, with some domestic elements, including direct sales into the United States and one or more participants based in the United States (here the United States subsidiaries and distributors of the producers). Dee-K does not specify whether it is the nationality of the participants involved in the alleged antitrust violation, the location of their acts, the nature of their target market, or some combination of these factors that must be foreign to render their conduct "wholly foreign."

The *Carpet Group* and *Nippon Paper* courts did not state or suggest the origin of the phrase "wholly foreign." A possible source for the phrase is the legislative history of the FTAIA, the 1982 statute that required "a direct, substantial and reasonably foreseeable effect" on United States commerce for antitrust jurisdiction over conduct involving non-import foreign commerce. *See* 15 U.S.C.A. § 6a(1); H.R. Rep. No. 97-686, at 10 (1982), *reprinted in* 1982

U.S.C.C.A.N. 2487, 2495. A House Report explained that the FTAIA covers "wholly foreign transactions as well as export transactions" but not "import transactions." *Id.* In the FTAIA's legislative history, then, "wholly foreign transactions" appear to be those conducted entirely outside the United States -- transactions that have no point of contact with this country. *See also In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 486 (N.D. Cal. 1989) (characterizing the FTAIA as applicable to "wholly foreign commerce") (subsequent history, culminating in Hartford Fire, 509 U.S. 764, omitted). If this legislative history indeed constitutes the source of the phrase "wholly foreign," the history itself makes plain that the phrase does not apply to cases like ours, which involve "import transactions." Dee-K derives little benefit, however, from this possible origin of the phrase, because based on the legislative history, "wholly foreign" cannot be an appropriate characterization of the transactions at issue in *Hartford Fire* itself -- which involved a refusal to sell to United States consumers. Thus, if the FTAIA's legislative history is the source of the term "wholly foreign," a court certainly should not use the term in deciding whether to apply the *Hartford Fire* test.

Carpet Group and *Nippon Paper*'s characterization of *Hartford Fire* as involving "wholly foreign" conduct may, however, simply have been a shorthand description of the case, for in neither *Carpet Group* nor *Nippon Paper* does the holding turn on this characterization or otherwise assist Dee-K. Indeed, the analysis of the Third Circuit in *Carpet Group* is directly contrary to that suggested by Dee-K. The Third Circuit did refuse to apply the *Hartford Fire* test to a conspiracy among United States and foreign entities to protect the role of distributors in the United States market for imported carpets. However, the *Carpet Group* court did not simply point to the existence of some domestic contacts and

end its analysis, as Dee-K would have us do. Rather, before applying the *McLain* domestic-conduct jurisdictional standard, the Carpet Group court determined that the alleged conduct "deal[t] primarily with conduct in the United States," because of the United States location of most participants, several targets of their pressure, and several of their meetings. 227 F.3d at 64-68, 75. Thus, looking at participants' affiliations and the locations of both acts and targets, the court focused on whether the conduct at issue was "primarily" domestic or foreign, not whether it was "wholly" domestic or foreign.

Furthermore, and perhaps most importantly, characterization of a prior case by a lower court cannot revise or amend the case's language or facts. Hence, even if *Carpet Group* or *Nippon Paper* had held that Hartford Fire controlled only "wholly foreign" conduct, that could not change the language or facts of Hartford Fire itself. In *Hartford Fire*, although the district court had used the term "wholly foreign" in a related context, *see In re Ins. Antitrust Litig.*, 723 F. Supp. at 486, the Supreme Court *never* described the conduct before it as "wholly" foreign. Moreover, some of the participants in one of the conspiracies alleged in *Hartford Fire* were entities based in the United States, *see* 509 U.S. at 775, 776, 795, all of the London-based corporate defendants were "subsidiaries of American corporations," and at least one key meeting attended by London-based defendants occurred in New York City. *See In re Ins. Antitrust Litig.*, 938 F.2d 919, 922-23, 929 (9th Cir. 1991), *rev'd on other grounds sub nom. Hartford Fire*, 509 U.S. 764. Thus, *Hartford Fire* itself severely undercuts Dee-K's claim that the substantial-effect test applies only to "wholly" foreign conduct, and Dee-K has shown no other reason to limit Hartford Fire to such conduct. *But see* IA Areeda & Hovenkamp § 272e at 354 (hypothesizing that the

Sherman Act might reach even conduct with "only remote[ ] and insignificant[ ]" effects on the United States and no intent to affect the United States if "American firms participate" or "some planning or other conduct" occurs here).

Dee-K's other foreign-conduct argument, although reiterated several times, fares no better. Dee-K repeatedly contends that whenever conspirators "sell price-fixed goods directly into U.S. commerce," the conspiracy must be regarded as domestic rather than foreign conduct, because these goods by definition are then "in" United States commerce. This single-factor test -- under which even a conspiracy hatched and planned entirely on foreign soil by foreign entities would be domestic if it resulted in direct sales of price-fixed goods into a United States import market -- comes perilously close to clear conflict with *Hartford Fire*. After all, there the Supreme Court characterized as "foreign conduct" a conspiracy to refuse to sell reinsurance policies directly into United States markets. The Hartford Fire conspiracy had a direct, anticompetitive impact on a United States import market -- just like the direct anticompetitive impact that Dee-K attributes to the rubber-thread price-fixing conspiracy.

Dee-K apparently hopes to distinguish *Hartford Fire* simply because that case concerned a *refusal* to sell to, rather than a sale to, purchasers in the United States. We acknowledge that in some circumstances this factual distinction may have significance.[6] When we consider actual

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[6] The *Hartford Fire* Court specifically declined to decide whether the FTAIA governed a refusal to sell a service into the United States, even though the lower courts had held that the FTAIA did not apply to such conduct. *See In re Ins. Antitrust Litig.*, 723 F. Supp. at 486, *affd on this ground*, 938 F.2d at 932, *rev'd on other grounds sub nom. Hartford Fire*,

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harm to United States consumers, however, we see no distinction between the impact of refusing to sell and that of fixing the price of imported goods, both of which may seriously and directly harm United States consumers. Both situations involve harmful conduct affecting a transaction in which a United States participant takes place.

In refusal cases, courts have not hesitated to require antitrust plaintiffs to allege and prove a substantial effect on the United States. In addition to the *Hartford Fire* Court itself, the Ninth Circuit required such proof in a case involving allegations that competitors had divided up the right to sell directly to United States consumers, even though market division rings the same alarm bells as price fixing; indeed, both constitute *per se* Sherman Act violations. *See Metro Indus.*, 82 F.3d at 841, 843-44.

Moreover, given complex global trade patterns of sale, resale, and distribution, Dee-K's formulation would grant United States courts jurisdiction over a great variety of foreign conduct. *Cf. Den Norske Stats Oljeselskap*, 241 F.3d 420 (rejecting the existence of any form of antitrust jurisdiction over a foreign conspiracy even though it assertedly indirectly raised prices in a United States import market, in part because the plaintiff was not a buyer or seller in that market). For example, in every case involving direct sales to the United States in which our antitrust laws condemn an activity *per se*, however foreign the conduct, United States courts would have jurisdiction without any showing whatsoever of an effect on United States commerce.

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509 U.S. at 796 n.23 (taking no position on the applicability of the FTAIA). Perhaps the Court declined to decide the issue because a refusal to sell a service into the United States does not 'enter' the United States in some sense, as an import does.

See, e.g., *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 995 (4th Cir. 1990) (noting that explicit horizontal minimum price fixing is a *per se* violation of the Sherman Act). Yet the rationale for *per se* rules in cases addressing domestic conduct seems plainly "inapplicable to foreign restraints that . . . pose very little danger to American commerce." IA Areeda & Hovenkamp § 273 at 370-71 (noting that "price fixing in a foreign country might have some but very little impact on United States commerce," and concluding that "appraising restraints abroad requires an assessment of effects on American foreign commerce").

Perhaps for this reason, courts have consistently required a showing of effect on United States commerce even in cases involving price fixing on imports. Before *Hartford Fire*, the Seventh Circuit considered a conspiracy among "twenty domestic and nine foreign corporations . . . to fix the price of uranium in the world market" at meetings in five foreign countries and the United States. *See In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980). In that case the Seventh Circuit applied Alcoa's effects test, although the domestic participants greatly outnumbered the foreign participants, a meeting occurred in the United States, and the target market included the United States. *See id.*, at 1253-54. Similarly, in *Nippon Paper*, on which Dee-K heavily relies, the First Circuit had no trouble treating a criminal conspiracy resulting in price fixing of goods imported into the United States as "foreign conduct" requiring proof of a substantial effect on United States commerce. *Nippon Paper*, 109 F.3d at 2.[7]

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[7] The *Nippon Paper* court stated that the Sherman Act treated civil and criminal jurisdiction alike and then extended criminal jurisdiction by applying the *Hartford Fire* test from the civil context. *See* 109 F.3d at 4-8. Dee-K seeks to distinguish *Nippon Paper* on the ground that it

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Finally, the Executive Branch has endorsed the view that plaintiffs alleging antitrust violations affecting imports into a United States market must still prove a substantial effect on United States commerce. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.11 (1995), available at http://www.usdoj.gov/atr/public/guidelines/internat.htm (as of July 2, 2002) (advising that "[i]mports into the United States by definition affect the U.S. domestic market directly" but that they yet must "produce the requisite substantial effects," while commenting that effects are likely to be "clear" in such a case).

For these reasons, we reject Dee-K's contention that Hartford Fire never applies when a conspiracy involves price-fixed goods sold directly into United States commerce.

B.

We likewise reject the producers' equally rigid view as to the applicability of *Hartford Fire*. The producers contend that in assessing whether "conduct" is "foreign" (and thus subject to the substantial-effect, rather than the domestic

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involved goods not directly sold into the United States market by the price-fixers themselves. However, Dee-K can point to no authority applying per se condemnation to foreign price fixing simply because the price fixing was on directly imported goods. Moreover, nothing in *Nippon Paper* suggests that the corporate layer between the price-fixers and the United States market protected the price-fixers from full domestic treatment, *i.e.*, that the case might have been analyzed as domestic conduct if the price-fixing scheme had not been indirect. Indeed, the commentators see *Nippon Paper* as novel, not because it applied an effects test as a prerequisite for jurisdiction, but because it asserted jurisdiction at *all* in a criminal context. *See* Fugate § 2.14 at 14, 15 (Supp. 2002); IA Areeda & Hovenkamp § 272i at 364-68.

McLain test), we should consider only the location of acts that themselves independently violate the Sherman Act. According to the producers, "the *Hartford Fire* test . . . is based solely upon the situs of a conspiratorial agreement." The producers thus turn Dee-K's argument back upon it: even if *Hartford Fire* does apply just to "wholly foreign conduct," the only relevant "conduct" is the conspiratorial meetings themselves. In this case, they argue, we should therefore focus only on the location of the meetings at which the conspirators agreed to fix prices -- and all of those meetings were held outside the United States.

The producers' suggested rule eliminates any examination of the national affiliation of the participants in the conduct, the scope and location of the target market, and the location of all acts other than the actual conspiratorial acts. This rigidity troubles us. A noted commentary has warned against an overly rigid approach in this area of antitrust law: "to say that domestic *per se* rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with significant and obvious effects on United States commerce, and without any plausible purpose other than the suppression of competition with and in the United States." IA Areeda & Hovenkamp § 273 at 371. In short, the flexibility that permits a court not to apply domestic rules to a defendant engaging in foreign conduct should be balanced by a court's ability to allow a plaintiff to pursue foreign conduct that does harm United States interests -- even if the defendants scrupulously entered into their illegal agreements only outside the United States.

The suggestion that we consider only the location of certain acts concerns us particularly given that ever since *Alcoa*, the Supreme Court's jurisdictional analysis has emphasized above all else the effects, *i.e.*, the intended

location, actual location, and magnitude of those effects. *See, e.g.*, *Kruman*, 284 F.3d at 395. Quite simply, the Supreme Court has moved away from its earlier doctrine focused solely on the location of acts. We therefore doubt whether a jurisdictional rule focused exclusively on defining and locating a certain limited set of acts could possibly be appropriate.

The potential consequences of the rule that the producers champion only confirm our doubts. If, for example, executives of United States corporations that did business solely in the United States met abroad simply to consummate a price-fixing conspiracy that was carried out entirely within the United States, the producers' proposed rule would still require special proof of the conspiracy's effect before a United States court could assert jurisdiction.

We reject this overly narrow view. *McLain* might well apply to such a conspiracy, even though the acts that constituted the illegal agreement took place exclusively abroad. Conversely, as the Second Circuit has noted, meetings in the United States to negotiate "an agreement to fix prices in an overseas foreign market that had no effect on domestic commerce" do not yield antitrust jurisdiction in our courts. *See Kruman*, 284 F.3d at 395. The universe of factors relevant to our jurisdictional analysis must be greater than the location of the specific conspiratorial acts alone.

C.

Instead of the parties' bright-line rules, we believe a court should properly engage in a more flexible and subtle inquiry. In determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted

antitrust violation are primarily foreign or primarily domestic.

This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly produce. We cannot begin to foresee the scope or complexity of future transactions. To adopt the simplistic rules the parties favor might well yield unintended and unfortunate results.

Moreover, this area of antitrust law has historically been marked by change, and remains a subject of serious debate. Not only the courts, but also numerous commentators and even representatives of various other countries (as frequent amici), have presented differing views, focusing on various elements of conduct as crucial in addressing whether assertion of jurisdiction is appropriate. Given these concerns, we believe courts should remain able to consider the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction in any given case.

We note that this approach echoes that of the Third Circuit in *Carpet Group* and finds support in several of the treatises. *See Carpet Group*, 227 F.3d at 75; Fugate § 2.12 at 80-82 (discussing the location of "acts and agreements," the location of their effects, and the nationality of participants in considering jurisdiction); Restatement (Third) of Foreign Relations Law § 415(2) (applying the same proposed jurisdictional test to "[a]ny agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States" (emphasis added)); *cf. Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 849 (10th Cir. 1981) ("When the contacts with the United States are few, the effects upon American

commerce minimal, and the foreign elements overwhelming . . . we do not accept jurisdiction.").

In this case, the bulk of the conduct related to the global conspiracy alleged in the complaint and proved at trial occurred abroad. As in *Nippon Paper*, the agreements here were all formed entirely outside the United States -- in several other countries. The target of the conspiracy was a global market, and the participants monitored prices in many markets around the world. Although dozens of people participated in the meetings over the years, Dee-K can only point to two who held office in United States companies, and both of them also had important and in fact primary roles in Southeast Asian companies.

To be sure, the producers sold rubber thread in the United States to United States consumers. In particular, Heveafil sold through a United States division of the parent producer, directing pricing by communications from Southeast Asia, while Rubfil sold through a wholly owned United States subsidiary and co-defendant. In addition, a handful of faxes from the producers describe pricing in the United States. It further appears that a United States distributor was made aware, by a fax sent "FYI," of a group commitment not to hire an executive whom one producer had fired for his opposition to price increases.

But these links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia (and around the world). *See In re Uranium Antitrust Litig.*, 617 F.2d at 1254 (applying *Alcoa*'s effects test in a price-fixing case even though twenty participants were domestic and only nine foreign and the United States was part of the target market). Just as the Third Circuit looked at a mass of conduct and concluded it was "primarily" domestic in *Carpet Group*, 227 F.3d at 75, so examining all of the conduct here, we can only conclude that it is primarily foreign. The handful of contacts

with the United States that Dee-K cites cannot change the fact that the rubber-thread conspiracy was formulated and furthered at numerous meetings, all of which took place in Southeast Asia, with attendees, all of whom worked for Southeast Asian firms, and who directed their activity to the global market. Only a few of the participants had any United States affiliation, and each of those also had a primary Southeast Asian affiliation. In addition, although we have explained that we do not find this factor alone dispositive, we consider it significant that not one of the conspirators' many meetings took place in the United States. In light of all of these factors, we conclude that the price-fixing conspiracy Dee-K alleged and proved was primarily "foreign conduct" to which the *Hartford Fire* test properly applied.

In closing, we note that even when a conspiracy constitutes "foreign conduct," an antitrust plaintiff still has access to the federal courts to challenge it. The district court did not dismiss Dee-K's lawsuit because its claim involved foreign conduct. The court merely required Dee-K to prove that the foreign conduct had a substantial effect on United States commerce in order to recover. Other litigants who claim that foreign conduct, which violates our antitrust laws, has harmed them may also have their day in court, and the federal courts will provide redress for those who can show that the harm of which they complain had a substantial effect on our commerce. For Dee-K, that day in court has come and gone.

IV.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:98-CV-10-MU
3:99-CV-161-MU

DEE-K ENTERPRISES, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
HEVEAFIL SDN.BHD, et al.,	)	
Defendants.	)	
	)	ORDER
DEE-K ENTERPRISES, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
Pt. BAKRIE SUMATERA PLANTATIONS, et al.,	)	
Defendants.	)	

THIS MATTER is before the Court upon Plaintiffs' Motion for a New Trial or Judgment as a Matter of Law, filed April 6, 2001, Defendants' Response, filed May 4, 2001, and Plaintiffs' Reply, filed May 14, 2001.

A jury trial was held in this matter during March, 2001, Plaintiffs request a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A motion for a new trial under Rule 59(a) should be granted if (1) the verdict is against the clear weight of the evidence, (2) is based upon evidence which is false, or (3) will result in a miscarriage of

justice. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

The Court does not believe that Plaintiffs are entitled to a new trial. The *Hartford Fire* jury instructions were warranted and in accordance with the law. Plaintiffs were required to show that the conspiracy had a substantial effect in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.") The jury found that Plaintiffs failed to meet their burden, and this finding is not against he clear weight of the evidence, is not contrary to law and does not amount to a miscarriage of justice.

As an alternative to its motion for a new trial, Plaintiffs ask this Court for judgment as a matter of law on the second jury issue.[1] The Defendants argue that Plaintiffs failed to move for judgment as a matter of law at the close of all the evidence; therefore, Plaintiffs are precluded from requesting a judgment as a matter of law in a post-trial motion. The Court agrees.[2] *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 814 F. Supp. 457, 461 n.8 (M.D.N.C. 1993) ("[A] federal district court is precluded from entertaining a motion for judgment as a matter of law unless the movant has first

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[1] The first jury read, "Was there a conspiracy, involving one or more of the Defendants, to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States?" The jury responded in the affirmative. The second jury issue asked, "Did the conspiracy have a substantial effect in the United States?" The jury indicated a negative response.

[2] Mindful of this requirement, the Court asked the Defendants if they intended to renew their motion under Rule 50(b). The Court then asked if there was anything for the Plaintiffs. Counsel for the Plaintiffs responded, "No."

sought a judgment as a matter of law after all of the evidence.").

Plaintiffs attempt to argue that a "post-trial attack on one of multiple special verdicts, especially one based on legal grounds, is not subject to the requirement of a previous Rule 50 motion." Plaintiffs' Reply at 3. Plaintiffs are wrong and the cases cited by Plaintiffs do not support this statement.[3] The general rule remains that a party may move for judgment as a matter of law after the verdict, only if the party earlier moved for a judgment as matter of law at the close of the evidence.

Even if Plaintiffs' motion for judgment as a matter of law had not been waived, the Court would deny it. The motion can only be granted "if, viewing the evidence most favorable to the non-moving party and drawing every legitimate inference in that party's favor, [it is determined that] the only conclusion a reasonable trier of fact could draw from the evidence is in favor of the moving party." *Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc.*, 87 F.3d 654, 656-57 (4th Cir. 1996) (citations omitted). The

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[3] For example, Plaintiffs cite *Traders and General Ins. Co. v. Mallitz*, 315 F.2d 171, 175 (5th Cir. 1963). That case is inapplicable to the present controversy. In that decision, the court was asked to consider whether or not the judgment was the proper judgment in light of the jury's responses. *See id.* ("Here, the question is not as to the sufficiency of the evidence, but as to the proper judgment to be entered upon the special verdict."). In this case, Plaintiffs attempt to argue that the jury's answer to the second issue was "contrary to the clear weight of the evidence." Plaintiffs' Memorandum at 2.

Plaintiffs also cite *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987). In that case, the Court found that the motion for JNOV (now judgment as a matter of law) "did not allege defects in proof, but rather inconsistencies in the answers given in the special verdict." *Id.* at 1369. As discussed above, Plaintiffs attempt to argue that the jury verdict is contrary to the clear weight of evidence. Plaintiffs are precluded from making this argument.

Court is thoroughly convinced that, after viewing the evidence in the light most favorable to the Defendants, a reasonable jury could answer the second issue in the negative.

IT IS THEREFORE ORDERED that Plaintiffs' Motion is DENIED.

This the 4th day of June, 2001.

/s/
CHIEF UNITED STATES
DISTRICT JUDGE
GRAHAM C. MULLEN

APPENDIX C

United States District Court
For the Western District of North Carolina
Charlotte Division

DEE-K ENTERPRISES, INC.
and ASHEBORO ELASTICS CORP.,
Plaintiffs,

v.

HEVEAFIL SDN BHD., et al.,
Defendants.

Civil Action
No. 3:98-CV-10 MU

CONSORTIUM INTERNATIONAL CORP.,
Cross-claimant,

v.

HEVEAFIL SDN BHD., et al.,
Cross-claim Defendants.

ORDER DIRECTING ENTRY OF JUDGMENT

In accordance with the jury verdict duly rendered on March 14, 2001, the Court hereby orders the Clerk to enter judgment as follows: (i) awarding judgment in favor of Defendants Heveafil Sdn. Bhd., Filmax Sdn. Bhd., Filati Lastex Elastofibre USA, Inc., Rubfil Sdn. Bhd. and Rubfil USA, Inc., (ii) stating that Plaintiffs shall take nothing from these Defendants, and (iii) dismissing all claims against these Defendants on the merits with prejudice. Under Rule 54(b) of the Federal Rules of Civil Procedure, the Court determines that there is no just reason for delay and directs the entry of judgment on these terms.

The parties retain all rights to make appropriate filings with respect to costs and attorneys' fees under Rule 54(d) and Local Rule 54.1.

Dated; March 26, 2001
Charlotte, North Carolina

/s/
Graham C. Mullen
Chief United States
District Judge

APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA
CHARLOTTE DIVISION**

DEE-K ENTERPRISES, INC.,
et al.,
Plaintiffs,
v. Case No. 3:98-CV-10-MU
HEVEAFIL SDN. BHD.,
et al.,
Defendants - Appellees.

DEE-K ENTERPRISES, INC.,
et al.,
Plaintiffs,
v. Case No. 3:99-CV-161-MU
PT. BAKRIE SUMATERA
PLANTATIONS, et al.,
Defendants.

VOLUME VII

Jury Trial before the HONORABLE GRAHAM C. MULLEN, Chief Judge, for the Western District of North Carolina, held in Courtroom 3, at the U.S. Courthouse, 401 West Trade Street, Charlotte, North Carolina, before Dennis Zambataro, Certified Court Reporter, on March 13, 2001, commencing at 9:00 a.m.

On behalf of the Plaintiff:

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MR. CURRAN: [for Heveafil et al.] ....Something along the lines of: Was there a conspiracy involving one or more of the defendants intended to have a substantial effect in the United States?

Again, I guess there has to be some reference to extruded rubber thread.

Was there a conspiracy involving one or more of the defendants to fix the prices of extruded rubber thread --

THE COURT: Intended to have a substantial effect in the United States.

MR. CURRAN: Yes, Your Honor.

THE COURT: Okay. No problem.

MR. BRADY: [for Dee-K and Asheboro] Your Honor, we object to the use of the terms "substantial effect" in any of the jury instructions.

THE COURT: Because you have indicated an objection the *Hartford Fire* case?

MR. BRADY: That's correct, Heveafil, the Malaysian company, had a presence in the United States during the time of the conspiracy alleged.

THE COURT: Nice try. I disagree. I [do not [sic]] distinguish *Hartford Fire*. I find it is the controlling law in this case, and we will proceed on that basis.

Of course, I understand that all of you have the right to appeal – and I encourage all of you to do so. I have a responsibility to the county of Richmond, Virginia, and all of these people employed by the Fourth Circuit to oversee the operations of this Court, and I'm proud to provide them with continued employment.

MR. BRADY: ....Your Honor. May we make reference to the objections we raised at this conference this morning.

THE COURT: That is my understanding, you may refer or renew the objection to the Court's instruction on page 18.

MR. BRADY: Yes.

* * *

THE COURT: "Charge and Summaries," page 19, use of depositions, page 20.

"Direct and Circumstantial Evidence," page 21.

"Elements of Defense," page 22.

MR. BRADY: Plaintiffs object, Your Honor.

THE COURT: Again renewing your objection on *Hartford Fire.*

MR. BRADY: That is correct.

We would also ask that if the substantial effect instruction be given to the jury that at that time jury also be instructed that the substantial effect can be easily demonstrated, *Nippon Paper*, 62 Fed. Sup. 2nd at 195 gave three examples.

* * *

MR. BRADY: That substantial effect can be easily met. Three examples, number one, by more than a *de minimus* volume of Commerce.

THE COURT: I'm going to deny your objection on that, and give it like it is....

THE COURT: I will now ask counsel for both sides, are there any objections to the charge? You may take the case and see how you will find.

A JUROR: Do we take our books?

THE COURT: Yes, you may take all of your exhibits, notebooks, whatever you've got there.

THE CLERK: The boxes?

THE COURT: Go get them.

(Thereupon, the jury left the courtroom)

THE COURT: All right, for the Plaintiff, do you have any objections you wish to renew?

MR. DAVIDOW: Plaintiffs renew their objections under rule 51 to the Court's jury instructions for reasons given at this point in its change conference, and, specifically, the instructions on pages 18, 22, 23, 25, 27, 28, 29, 31, 32, 33.1, 35, 36, 37, 39, 40, 41, 47, 50 and 51.

Also Plaintiffs object to the Court's failure to give Plaintiff's proposed instructions, numbers 6, 25, 35, 37, 44, and 45.

THE COURT: Thank you, sir, for being so succinct. Anything for the defense?

NOV 29 2002

No. 02-649

Supreme Court of the United States

DEE-K ENTERPRISES, INC. AND
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Heveafil Sdn. Bhd. ("Heveafil") is not a publicly held entity. Heveafil's parent corporation is Permodalan Nasional Berhad, which owns ninety-one percent of Heveafil. Permodalan Nasional Berhad is not a publicly held entity.

Filmax Sdn. Bhd. ("Filmax") is not a publicly held entity. It is wholly owned by Heveafil.

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9A Charles Alan Wright & Arthur R. Miller, *Federal
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STATEMENT OF THE CASE

The trial in this case presented a straightforward application of *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), in which this Court held that Sherman Act liability for a foreign conspiracy requires proof of an intended and actual "substantial effect" in the United States. *Id.* at 796. Before trial, Petitioners readily acknowledged their evidentiary burden: "Under *Hartford Fire Insurance*, Plaintiffs must and will show that the conspiracy had the intended and actual effect of injuring purchasers in the United States by causing them to pay higher prices for elastic rubber thread than they would have otherwise paid." C.A. App. 268 (Petitioners' Pre-trial Brief). Late in the trial, however, after it became apparent that Petitioners would not meet that burden, they disputed the applicability of *Hartford Fire* for the first time. The trial judge rejected Petitioners' attempt to escape their burden, and eight jurors found unanimously that Petitioners had not proved any "substantial effect" in the United States. A Fourth Circuit panel affirmed unanimously. Contrary to Petitioners' urging of some sort of circuit split, the Fourth Circuit expressly relied on *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000). *E.g.*, Pet. App. at 25a (Fourth Circuit stating that its approach "echoes that of the Third Circuit in *Carpet Group*"); at 26a ("As in *Nippon Paper*, the agreements here were all formed entirely outside the United States—in several other countries.").

A. Petitioners brought this case against extruded rubber thread ("ERT") producers in Malaysia, Indonesia, and Thailand, alleging that the producers met on various occasions in Southeast Asia to fix ERT prices worldwide during 1991-96. Respondents are the Malaysian-owned Defendants who contested Petitioners' claims and appeared at trial. The other Defendants settled or defaulted.

Petitioners' evidence of a conspiracy consisted mainly of two videotaped depositions. One deponent testified to the formation of a conspiracy in Southeast Asia, but he never testified that it was carried out in the United States. The other, who the jury learned Petitioners had paid $32,000 for his deposition, testified about a Southeast Asian conspiracy regarding talc-ERT, but he also testified that the conspiracy did not cover silicon-ERT, the only product that Petitioners and most other U.S. customers purchased. C.A. App. 1467-72. The second deponent also specifically disclaimed any knowledge about the U.S. market for ERT. *Id.* at 1467. Neither deponent—indeed no witness at trial—testified that priced-fixed goods were ever sold in the United States.

In contrast, Respondents called numerous live witnesses—including current and former employees and customers—who testified that during the alleged period of the conspiracy, Respondents were forced to raise prices in the United States due to U.S. antidumping duties and increases in raw material costs. One witness, a U.S. trade lawyer for Malaysian ERT producers, testified that he told his clients "they were in a big mess" because of the "counterintuitive" purpose and "complexity" of the U.S. antidumping laws. *Id.* at 803-04. He elaborated: "[T]he reason Congress wrote this law was to force foreign companies to raise their prices in the U.S. I mean that is the basic purpose of the law. And all of the technical features in the law are driven around creating that outcome as much as possible." *Id.* at 804. Notably, during the entire alleged period of the conspiracy, Respondents *never raised prices enough* to satisfy the U.S. Government and as a result were continually hit with trade penalties designed to raise their prices. *Id.* at 836-38.

A worldwide latex-price spike only exacerbated Respondents' antidumping predicament. As one witness testified, "latex was the single most important cost element" in ERT, therefore all ERT producers, domestic and foreign,

increased prices in response to the latex-price spike. *Id.* at 836. Unlike their U.S. competitors, however, Respondents were unable to absorb increased latex costs because the antidumping duties dictated that increases in costs yield corresponding increases in price. *E.g.*, *id.* at 1191 (testimony that "[w]henever the latex price would go up a penny per pound of rubber thread, to produce a pound of rubber thread, they had to increase their price by a penny; otherwise, they had to pay it to the U.S. government").

Numerous witnesses testified that notwithstanding the antidumping duties and latex-price increases, Respondents engaged in vigorous competition against one another and even against U.S. producers (who were not saddled with antidumping penalties). Respondents' U.S. sales personnel testified to cutthroat competition to maintain market share. *E.g.*, *id.* at 3575-77. Customer-witnesses confirmed this price competition. *E.g.*, *id.* at 1074, 1102-04, 1133-35. Indeed, Petitioners' own pricing data confirmed this vigorous competition, showing disparities among what Respondents charged, and between what the two Petitioners paid for contemporaneous purchases from the same Respondent. *E.g.*, *id.* at 3746-48, 4011. Petitioners' data also confirmed a direct correlation between price increases and the recurring imposition of trade penalties and increases in latex costs. *E.g.*, *id.* at 4017, 4022.

Moreover, Respondents' U.S. sales personnel specifically disclaimed any knowledge of, or participation in, price fixing, and also testified to independence and discretion in setting U.S. prices. *E.g.*, *id.* at 1033 ("We determined price in the United States. They sold in 60 or 80 countries and this was just another one of them. That's why they hired us, to sell here."). Thus, no price-fixing conspiracy could have been successfully implemented in the United States without the knowledge and cooperation of the U.S. sales personnel,

but Petitioners never attempted to prove such knowledge or complicity.

In contrast to Respondents' substantial evidence that their U.S. prices were driven by legitimate market and regulatory forces, the lay testimony of Alan Hays constituted Petitioners' sole attempt to prove that the conspiracy alleged actually caused higher prices in the United States. Mr. Hays testified to so-called "price differences" that Petitioners paid during the alleged period of the conspiracy. He calculated the "price differences" by taking the price Petitioners paid for Malaysian ERT in 1991 and projecting it forward for the years 1992-96 using the U.S. producer price index ("PPI")—accounting for no other factor. Petitioners attributed any "price difference" above that general, inflationary index to a conspiracy, but their effort did not withstand the cross-examination of Mr. Hays:

> Q: You don't know whether the differences in prices that you have come up with, whether those are attributable to a price-fixing conspiracy, correct?
>
> A: No, I have no knowledge of that.
>
> Q: And you don't know whether the differences are due to increased raw material costs, correct?
>
> A: I have no knowledge of it.
>
> Q: You don't know whether the increases are because of dumping duties, correct?
>
> A: No, I do not.

C.A. App. 724-25.

B. As Petitioners alleged a conspiracy formed entirely outside the United States, the District Court found that *Hartford Fire* governed and accordingly instructed the jury using this Court's "substantial effect" language. *Id.* at 1340. The court also issued a special verdict form. The first question asked: "Was there a conspiracy, involving one or more of the Defendants, to fix the prices of extruded rubber

thread, which was intended to have a substantial effect in the United States?" *Id.* at 3665. The jury answered "Yes." *Id.* The second question asked: "Did the conspiracy have a substantial effect in the United States?" *Id.* The jury answered "No." *Id.* Upon that unanimous verdict, the court entered judgment in favor of Respondents.

The jury's "No" on question two made it unnecessary to proceed to the other questions prerequisite to a finding of liability: (i) whether each Respondent knowingly participated in the conspiracy; (ii) whether Petitioners' claims were barred by the statute of limitations; (iii) whether Petitioners purchased products covered by the conspiracy; and (iv) whether Petitioners could prove reasonably ascertainable damages from such purchases. C.A. App. 3665-69.

After trial, Petitioners filed a post-verdict motion for judgment as a matter of law ("JMOL") under Rule 50 of the Federal Rules of Civil Procedure, or in the alternative for a new trial under Rule 59. Petitioners had not moved for JMOL at any time during trial, however, and the District Court denied them JMOL on that basis. Pet. App. 29a.[1] The District Court also denied a new trial, concluding that the jury's finding of no substantial effect was not against the clear weight of the evidence. *Id.*

The Fourth Circuit unanimously affirmed, holding (i) that the District Court properly instructed the jury according to *Hartford Fire* because the evidence showed a "primarily foreign" conspiracy formed entirely in Southeast Asia, Pet.

---

[1] In contrast, Respondents preserved their objections to Petitioners' failures of proof by moving for JMOL three times at trial, and the court reserved the possibility of entering JMOL for Respondents, submitting the case to the jury only conditionally. C.A. App. 1199 ("I'm not going to deny it. . . . I'm going to submit the case to the jury subject to the 50(b) motion.").

App. 26a-27a, and (ii) that the jury's finding of no substantial effect was supported by "a good deal of evidence" at trial. *Id.* at 7a n.1.

C. A critical misstatement of the case warrants special attention. Throughout, Petitioners refer to price-fixed goods being sold in U.S. commerce. *E.g.*, Pet. 2, 3, 5, 6. But Petitioners proved no such thing, and the jury found no such thing. The jurors found a conspiracy (defined to them simply as an "agreement" or "meeting of the minds") in Southeast Asia to raise the price of ERT sold worldwide, including the United States, but the jurors also found that whatever conspiracy existed in Asia never resulted in a "substantial effect" in the United States. The jurors obviously credited the witness testimony and documentary evidence that Respondents' U.S. prices were not the result of a conspiracy, and found as the Fourth Circuit did that there was "a good deal of evidence" that "increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." Pet. App. 7a n.1.

REASONS FOR DENYING THE PETITION

Petitioners waived the arguments on which they premise their questions presented; the Fourth Circuit reached the correct result (including affirmance of a fact-bound jury verdict); and there is no circuit split. This case does not raise any question warranting this Court's review.

I. PETITIONERS WAIVED THE ARGUMENTS THEY NOW ATTEMPT TO RAISE.

Petitioners demanded a trial by jury, but *never* moved to make the substantial-effect question one for the court rather than the jury. Before trial and well into trial, Petitioners acknowledged that they were required to prove both elements of the *Hartford Fire* test. Only mid-trial did Petitioners first object to *Hartford Fire*, and then only on the ground that it did not apply at all. These and other waivers prevent this

case from raising either of Petitioners' questions presented—viz., whether a plaintiff has the "option" of satisfying *Hartford Fire* or some other test, and whether, in this case, substantial effect was a question for the court rather than for the jury.

Petitioners describe their "vigorous objection" to, and "sharp disagreement" with, *Hartford Fire*, Pet. 2, 4, but fail to mention that they first voiced their objection and disagreement after they had already acknowledged their *Hartford Fire* burden repeatedly in writing and in open court, after the jury had been given its opening instructions and after the trial was more than half over. As noted above in the Statement of the Case, Petitioners' Pre-trial Brief stated: "Under *Hartford Fire Insurance*, Plaintiffs must and will show that the conspiracy had the intended and actual effect of injuring purchasers in the United States by causing them to pay higher prices for elastic rubber thread than they would have otherwise paid." C.A. App. 268.

Along with that brief, Petitioners filed proposed jury instructions that assigned the effect question to the jury: "This means that if you find that there was a conspiracy which affected the U.S. price levels of Extruded Rubber Thread, then it is established that the conspiracy affected U.S. commerce and the Sherman Act applies." *Id.* at 3663. Petitioners also filed a proposed jury instruction assigning the burden of proof to them on each element of their case.

On the eve of trial (literally) Petitioners filed a brief on proposed *pre-trial* jury instructions to be given at the start of the case:

> Plaintiffs propose amending the fifth sentence of their Sherman Act instruction as follows: "The Sherman Act applies to conduct abroad, so long as the foreign conduct was meant to have and did have a substantial effect on United States commerce."

. . . .

> . . . Plaintiffs' proposed changes to their Sherman Act preinstruction incorporate *Hartford Fire* and cure Defendants' objections without misstating the law.

District Court Docket Entry No. 157 at pp. 1-2, 9.

Accordingly, trial proceeded with Petitioners' recognition that they had to prove both elements of the *Hartford Fire* test. C.A. App. at 291 (court's remarks to jury pool: "Now, plaintiff who alleges a foreign price-fixing conspiracy must show that the conspiracy was intended to have and did have a substantial effect in the United States. And that is a thumbnail sketch."); at 330 (same to impaneled jury). Petitioners reiterated this burden in their opening statement: "Because as the Judge instructed you, it would be our duty not only to show a cartel that raised prices in America generally. We would have to show you that it raised prices to our two particular buyers here in North [Carolina] and Virginia." *Id.* at 375.

On the fifth day of the eight-day trial, Petitioners' lead counsel (counsel of record here) stated during a colloquy with the court that "under Hartford Insurance, I have a duty to show that the conspiracy caused adverse effects in the United States that are outside or different from those caused by the dumping law." C.A. App. 898. Later that day, Petitioners reversed themselves and filed a brief arguing that *Hartford Fire* did not apply at all. *See* District Court Docket Entry No. 233. The brief did *not* argue for a disjunctive or other reformulation of the two-part *Hartford Fire* test, nor that the test entailed a burden-shifting analysis, nor that Petitioners had the option of meeting the *Hartford Fire* test or some other test, nor that either element of the test was a question for the court rather than the jury. *Id.* The brief simply argued that *Hartford Fire* did not apply to this case.

Subsequently, at the charge conference, the court rejected Petitioners' belated attempt to escape their burden of proof and held them to the *Hartford Fire* test they had embraced until mid-trial. Petitioners proceeded to object to the inclusion of the words "substantial effect" in the jury instructions. Pet. App. 36a. Petitioners never argued, however, that because of overwhelming evidence or for any other reason the substantial-effect question was for the court rather than for the jury, nor did they argue that any burden had shifted to Respondents to disprove substantial effect. *Id.* at 34a-38a.

Moreover, Petitioners elected *not* to move for JMOL on substantial effect or any other issue at trial—despite the court's express invitation to do so. Pet. App. 29a & n.2; C.A. App. at 1095-96 ("Both counsel are reminded not to forget whatever motions at the close of all the evidence they need to be making on the record."); at 1148-49 (Petitioners declining court's invitation to move for JMOL); at 1198-99 (Court: "Do you renew your motion?" Mr. Curran: "Yes, Your Honor." Court: "Anything for the plaintiff?" Mr. Davidow: "No."). After trial, the District Court denied Petitioners' post-verdict motion for JMOL because of that waiver. Pet. App. 7a ("The district court denied . . . a late-filed Rule 50 motion for judgment as a matter of law on the substantial-effect question."); Pet. App. 29a. Finally, Petitioners elected *not to appeal* the denial of their post-verdict motion for JMOL. Pet. App. 7a n.1 ("Dee-K does not appeal the denial of its Rule 50 motion. It does, however, appeal the denial of its motion for a new trial, asserting that the jury's finding of no substantial effect was against the weight of the evidence."). Petitioners therefore waived *every* opportunity for JMOL (i.e., judgment by the court rather than the jury) on substantial effect or any other issue.

Whether Petitioners viewed the substantial-effect question as one they had proved or as one that had become a

purely legal question for the court because of some showing at trial, Petitioners were required to move for JMOL to keep the issue from the jury's purview and preserve either argument for appeal:

> It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. . . . Similarly, the litigant who has not moved for directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view.

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2536 (2d ed. 1995) (quoting *Little v. Bankers Life & Cas. Co.*, 426 F.2d 509, 510-11 (5th Cir. 1970)) (internal quotation marks omitted) (emphasis added); *see also, e.g.*, *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994) ("[I]mplicit in the party's failure to move for judgment as a matter of law is the belief that the evidence created a jury issue . . . .").

Furthermore, Petitioners' trial-end objection to the inclusion of the words "substantial effect" in the jury instructions neither constituted a motion for JMOL on that issue nor otherwise preserved for appeal any argument that the issue was one for the court rather than for the jury:

> A party who wants to challenge the propriety of submitting a given claim or defense to the jury is obliged to make a motion under Fed.R.Civ.P. 50(a) at some time prior to the submission of the case to the jury. . . . If a party could avoid the necessity of a Rule 50 motion simply by attacking the judge's decision to give certain jury instructions, the clarity achieved by the Rule 50 process would be compromised and little would be left of the general rule.

Savino v. C.P. Hall Co., 199 F.3d 925, 931 (7th Cir. 1999); *cf., e.g., McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 360 (9th Cir. 1996) (holding that an objection to an instruction on the specific ground of insufficient evidence for submission of the question to the jury may be a "sufficient approximation" for a *renewal* of a *prior motion* for JMOL).

By electing not to move for JMOL and confining their eleventh-hour objection merely to whether *Hartford Fire* applied at all, Petitioners waived any argument for a disjunctive or other reformulation of the two-part test, an option of meeting some other test, a burden-shifting analysis, or an assignment of part of the test to the court. For these reasons, the Fourth Circuit specifically held that "we need not decide whether the *Hartford Fire* formulation is the *only* test for jurisdiction in antitrust cases involving foreign conduct, because Dee-K has waived this argument by failing to pursue it in the district court." Pet. App. 15a n.5 (emphasis in original). Because of these waivers at trial and on appeal, this case raises neither of Petitioners' questions presented.[2]

---

[2] In addition to waiving the arguments they raise now in their questions presented, not one of Petitioners' authorities stands for the proposition that substantial effect is a question for the court rather than the jury. *See Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-02 (1969) (finding that $190,000 in sales under a domestic tying arrangement were not so insubstantial as to warrant summary judgment for defendants, and reversing and remanding for trial this "question of fact"); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (holding that where trier of fact found that defendants *had in fact accomplished* a horizontal division of an entire intrastate market, domestic test for effect on interstate commerce was met); *Gough v. Rossmoor Corp.*, 487 F.2d 373, 377 (9th Cir. 1973) (stating that where jurisdictional and merits issues are "completely intermeshed," both are jury questions); *Wirtz v. LaFitte*, 326 F.2d 856, 859 (5th Cir. 1964) (holding that employee's coverage under Fair Labor Standards Act was question of law when "undisputed facts" showed employment was directly related to interstate commerce); *Las*

II. *HARTFORD FIRE* COMPELLED THE FOURTH CIRCUIT'S HOLDING.

Petitioners appealed two issues to the Fourth Circuit: (i) whether the District Court erred in using *Hartford Fire*'s substantial-effect language in the jury instructions and special verdict form, and (ii) if not, whether the District Court erred in denying Petitioners' motion for a new trial, because the jury's finding of no substantial effect was against the clear weight of the evidence. Pet. App. 7a & n.1. The Fourth Circuit correctly affirmed on both issues, because like *Hartford Fire*, this case alleged a conspiracy formed entirely outside the United States, and there was ample evidence to support the jury's finding of no substantial effect.

A. In *Hartford Fire*, the plaintiffs alleged that domestic and foreign insurance companies (including foreign subsidiaries of U.S. corporations) "conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States," and actually limited that coverage. 509 U.S. at 770, 795-96, 819 n.10. The District Court dismissed the claims that named only certain London-based defendants on the basis of international comity. *Id.* at 778. One of these claims included domestic reinsurers as "unnamed co-

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Vegas Merch. Plumbers Ass'n v. United States, 210 F.2d 732, 748 (9th Cir. 1954) (holding in a domestic case that a question of effect on commerce "is clearly a question of fact" properly submitted to the jury); *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 195 (D. Mass. 1999) (submitting to the jury the issue "whether the volume of commerce affected by the conspiracy was substantial"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1174, 1176 (E.D. Pa. 1980) (noting that "preliminary pretrial determinations of the commerce nexus rest on a lesser showing than determinations of the same question at trial," and "when the jurisdictional and substantive issues become intertwined, consideration by a jury may become optional in the court's discretion").

conspirators." *Id.* at 777 & n.5. The Ninth Circuit reversed, holding that comity was no bar to Sherman Act jurisdiction, and this Court granted certiorari "to address the application of the Sherman Act to the foreign conduct at issue." *Id.* at 779. As part of its decision reversing the Ninth Circuit, this Court held:

> At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. Although the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.

Id. at 795-96.

There was one exception to the Court's general comment about the London reinsurers conceding jurisdiction. Before turning to the comity question, the Court specifically noted that one holdout among the London reinsurers contested subject-matter jurisdiction, arguing that "the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts." *Id.* at 795 n.21; *see also id.* at 796 n.22, 797 n.24 (noting that subject-matter jurisdiction was at issue and took priority over the comity question).

The Court held that the defendant "may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to *and did in fact produce a substantial effect on the American insurance market*." *Id.* at 795 n.21 (emphasis

added). Thus, because of the "foreign conduct" alleged, the Court's jurisdiction over the Sherman Act claims at issue depended on the allegations of intended and actual "substantial effect" in the United States.

The Court did not define "conduct," but the conduct at issue in Section One claims is clear: "the essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it . . . ." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991). This Court's repeated references to "foreign conduct" in *Hartford Fire*, therefore, were to the foreign agreements giving rise to the three claims at issue.[3]

The Court necessarily determined the "foreignness" of those agreements based on their formation abroad, rather than their target markets or the national affiliation of their participants, because all three agreements targeted the U.S. market and one included domestic reinsurers as participants. 509 U.S. at 795. One of the agreements also included overt acts in furtherance within the United States. *See In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 490 (N.D. Cal. 1989) (District Court in *Hartford Fire* noting that all three agreements were formed abroad and that one included overt acts in furtherance within the United States).

Significantly, the foreign situs of the conspiratorial agreements at issue in *Hartford Fire* was *not* dispositive of *whether* the Sherman Act applied—but instead was

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[3] When the Fourth Circuit rejected Petitioners' argument that *Hartford Fire* cannot apply if there are U.S. acts in furtherance, it noted that in *Hartford Fire* "at least one key meeting attended by London-based defendants occurred in New York City." Pet. App. 18a. The Fourth Circuit was aware, however, that the relevant agreements in *Hartford Fire* were formed abroad. Pet. App. 11a (describing *Hartford Fire* agreements as "formed abroad").

dispositive of the *test* used to determine the Act's applicability. The Court found that the Act applied because the foreign agreements were alleged to have had an intended and actual "substantial effect" in the United States. 509 U.S. at 795-96.

Because *Hartford Fire*'s test applied to foreign agreements among both foreign and domestic participants, targeting the United States, with overt acts in furtherance in the United States, that test necessarily applies here—where it is undisputed that Respondents "never met in the United States." Pet. App. at 6a; at 10a, 23a, 26a, 27a (same); *see also* Pet. 8 (conceding that "the price-fixing meetings were held in Asia").

B. The jury's fact-bound verdict was not against the clear weight of the evidence. As the Fourth Circuit found in affirming the denial of a new trial, Respondents "provided the jury with a good deal of evidence supporting" the jury's finding that there was no substantial effect in the United States, "including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." Pet. App. 7a n.1.

C. Petitioners are wrong in arguing that the Fourth Circuit's affirmance is contrary to this Court's other precedents. Petitioners completely ignore the divergence between the different tests for Sherman Act jurisdiction over foreign versus domestic agreements.

The *Hartford Fire* foreign-conduct test derives directly from *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945). In *Matsushita*, U.S. companies brought a predatory pricing claim under Section One against Japanese companies and their U.S. subsidiaries, alleging that the defendants formed a cartel in Japan to raise the price of televisions in that country

while selling televisions at artificially depressed prices in the United States. 475 U.S. at 577-78. The Court held that the plaintiffs could not recover based solely on proof of price-fixing in Japan because they also had to prove actual price-cutting in the United States: "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. . . . For this reason, [plaintiffs'] theory of recovery depends on proof of the asserted price-cutting conspiracy in this country." *Id.* at 582 n.6.

In *Alcoa*, the United States claimed that foreign companies violated the Sherman Act by forming two agreements outside the United States to control the output and price of aluminum—including aluminum the defendants sold in the United States. The court held:

> [T]he Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. . . .
>
> Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.

148 F.2d at 444. Applying this standard, the court concluded that the Sherman Act did not reach one agreement because that agreement specifically excluded the United States, but did reach the other because of its intent to affect U.S. imports and its actual effect on those imports. *Id.*[4]

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[4] Petitioners argue that *Alcoa*'s comment about "persons not in allegiance" to the United States means that the "effects" test does not apply to U.S. entities. Pet. 13. But *Alcoa* was merely noting that "any state may impose liabilities, *even* upon persons not within its allegiance,

In *Hartford Fire*, then, this Court relied on two cases that applied the "effects" test to agreements formed outside the United States with ensuing U.S. sales.[5] The Court did *not* rely on any of the domestic-agreement cases that Petitioners urge here, for good reason: the test for Sherman Act jurisdiction over domestic agreements set forth in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), is wholly distinct from the test applied in *Hartford Fire*. In *McLain*, the issue was "whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property." *Id.* at 234. The agreement was confined to the New Orleans area, and the Court held that the Sherman Act reaches "beyond activities *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce." *Id.* at 241 (collecting cases). The

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for conduct outside its borders that has consequences within its borders which the state reprehends." 148 F.2d at 443 (emphasis added).

[5] The Court cited three other cases: *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 706 (1962) (applying Sherman Act to a conspiracy formed in the United States and carried out here and abroad); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (same); and *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (applying Lanham Act to infringement abroad because of U.S. effects). Thus, Petitioners' selective quotation of *Continental Ore*, Pet. 10, ignores the dispositive point: "the conspiracy was laid in the United States, [and] was effectuated both here and abroad . . . ." 370 U.S. at 706.

The Court also cited the *Restatement (Third) of the Foreign Relations Law of the United States* § 415 and Reporters' Note 3 (1987). The *Restatement* sets forth a three-step, "sliding-scale" formulation that the Court did not adopt. Nonetheless, Section 415(3) of the *Restatement* would require the "substantial effects" test on the facts here. *See also* Pet. App. 15a n.5 (Fourth Circuit holding that Petitioners waived any argument for the *Restatement*'s "principal purpose" test).

Court continued: "[T]he jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." *Id.* at 242 (collecting cases).

The jurisdictional test in *McLain* derives from the Court's consideration of an intrastate conspiracy. Plainly, it is not the test applied to foreign agreements by *Hartford Fire*. *See generally Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 75 (3d Cir. 2000) ("*McLain* controls when subject matter jurisdiction over domestic conduct is at issue."). Petitioners insist that they were entitled to proceed under *McLain* notwithstanding the foreign agreements at issue here, because there were U.S. sales in this case while "*Hartford Fire* was a case about concerted refusal to sell." Pet. 12. But in *Hartford Fire* the London reinsurers sold their policies containing limited reinsurance coverage in the United States and the conspiracy actually limited primary coverage available in the United States. 509 U.S. at 795-96. Even assuming a meaningful distinction between the sales in this case and the coverage limitations in *Hartford Fire*, Petitioners ignore that *Alcoa* applied the intended and actual "effects" test to a foreign agreement despite ensuing U.S. sales. 148 F.2d at 442-44; *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2, 9 (1st Cir. 1997) (applying *Hartford Fire* to foreign conspiracy where conspirators controlled sales prices in the United States).

The divergence between the test applied to domestic conduct in *McLain* and the test applied to foreign conduct in *Hartford Fire* is indisputable. Petitioners could not be more wrong in arguing that the validity of the Fourth Circuit's affirmance depends on reading *Hartford Fire* as *sub silentio* "cutting back" *McLain*. Pet. 9-12. The cases are unrelated. *McLain* relied on nine of this Court's precedents (all domestic-agreement cases) in support of its jurisdictional test, but did not cite any of the cases that *Hartford Fire* relied

on for the foreign-conduct test. *McLain* and *Hartford Fire* are wholly independent branches of this Court's Sherman Act jurisprudence.[6]

III. THE FOURTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE HOLDINGS OF OTHER CIRCUITS.

A. The Fourth Circuit's affirmance is wholly consistent with the two cases with which Petitioners claim it conflicts: *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000).

In *Nippon Paper*, the defendants "held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America." 109 F.3d at 2. The court noted that the defendants:

> accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. . . . [The

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[6] Citing *McLain*, 444 U.S. at 243, Petitioners assert that they were entitled to injunctive relief despite their failure to prove substantial effect. Pet. 9. *McLain*, however, states only that a plaintiff who fails to prove "legally cognizable damages" may still obtain injunctive relief. 444 U.S. at 243. *Hartford Fire* makes clear that substantial effect is an element of jurisdiction. 509 U.S. at 795-96 & nn.21-22. As such, substantial effect is a prerequisite to liability, not a component of damages. Petitioners also incorrectly assert that *McLain* relied on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969), for their point. *McLain* did not cite *Zenith* regarding injunctive relief, but instead for the proposition that a "plaintiff's failure to quantify the adverse impact of defendant's conduct" is not a bar to jurisdiction. *McLain*, 444 U.S. at 243.

> lead defendant] monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged.

Id.

The United States indicted the defendants, arguing that price-fixing activities which took place entirely in Japan were prosecutable because they were intended to have, and did in fact have, substantial effects in this country. *Id.* Declaring that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct, the District Court dismissed the indictment. *Id.* The First Circuit reversed and reinstated the indictment.

The court began its analysis: "In *Hartford Fire*, the Justices endorsed *Alcoa*'s core holding, permitting civil antitrust claims under Section One to go forward despite the fact that *the actions which allegedly violated Section One occurred entirely on British soil.*" *Id.* at 4 (emphasis added). The First Circuit rejected the defendants' arguments that the Sherman Act could not reach their agreements formed in Japan, holding that *Hartford Fire* applies with equal force in civil and criminal cases: "*Hartford Fire* definitively establishes that Section One of the Sherman Act applies to *wholly foreign conduct* which has an intended and substantial effect in the United States. . . . [W]e are also bound to apply it by interpreting Section One the same way in a criminal case." *Id.* at 9 (emphasis added).

Like the foreign agreements in *Hartford Fire*, *Alcoa*, and this case, the meetings in Japan constituted the "wholly foreign conduct" that *Nippon Paper* described. Petitioners' attempt to distinguish *Nippon Paper* on the ground that there were no U.S. acts in furtherance in that case, Pet. 15, ignores that the conspirators controlled U.S. sales prices through intermediaries. 109 F.3d at 2.

In *Carpet Group*, U.S. importers of oriental rugs conspired in the United States to derail the plaintiffs' attempts to enable U.S. retailers to purchase rugs directly from foreign manufacturers. 227 F.3d at 63-64. The plaintiffs sought to eliminate the U.S. importers as middlemen, and the importers responded by forming concerted refusals to deal, boycotts, and other agreements to protect their turf and put the plaintiffs out of business. *Id.*

The *Carpet Group* defendants successfully moved the District Court to dismiss the case under the Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a ("FTAIA"). 227 F.3d at 65. The Third Circuit disagreed with the District Court, holding that the defendants' restraints on imports did not implicate the FTAIA's purpose of "facilitating the export of domestic goods by . . . relieving exporters from a competitive disadvantage in foreign trade." 227 F.3d at 71-72. (Likewise, the FTAIA is not at issue here because Petitioners did not allege restraints on export commerce.)

The *Carpet Group* defendants argued alternatively that the dismissal should be affirmed under *Hartford Fire* because the plaintiffs failed to demonstrate a substantial effect on U.S. commerce. The court rejected that argument and held that *McLain* rather than *Hartford Fire* applied because the defendants had conspired within the United States:

> *McLain controls when subject matter jurisdiction over domestic conduct is at issue.* We reject the defendants' reliance on *Hartford Fire*, because it dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct. *The instant case deals primarily with conduct in the United States, namely concerted action by United States importer/wholesalers directly to affect the domestic retail oriental rug market.*

Id. at 75 (emphasis added to highlight text omitted from Petitioners' quotation at Pet. 14-15).

In sum: *Nippon Paper* applied *Hartford Fire* to a price-fixing conspiracy formed in Japan where the conspirators allegedly fixed the price of a product sold in the United States. *Carpet Group* declined to apply *Hartford Fire*—and instead applied *McLain*—to a boycott and refusal-to-deal conspiracy formed in the United States. Here, the Fourth Circuit affirmed the application of *Hartford Fire* to a conspiracy formed exclusively in Southeast Asia where the conspirators allegedly fixed the price of a product sold in the United States. The judgment in this case is therefore entirely consistent with the results in *Nippon Paper* and *Carpet Group*. *See* Pet. App. 26a ("As in *Nippon Paper*, the agreements here were all formed entirely outside the United States—in several other countries."); *id.* ("Just as the Third Circuit looked at a mass of conduct and concluded it was 'primarily' domestic in *Carpet Group*, so examining all of the conduct here, we can only conclude that it is primarily foreign.") (citing *Carpet Group*, 227 F.3d at 75). Thus, this case does not present any conflict among the circuits, let alone a well-percolated and considered conflict.

Petitioners' attempts to conjure up conflict from extraneous statements in the opinion below are futile: "this Court reviews judgments, not opinions . . . ." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In accord with *Hartford Fire*, *Alcoa*, *Nippon Paper*, and *Carpet Group*, the Fourth Circuit relied primarily on the conspiracy's formation outside the United States. Pet. App. 27a ("[A]lthough we have explained that we do not find this factor alone dispositive, we consider it significant that not one of the conspirators' many meetings took place in the United States."). The court's additional consideration of the "target market" was merely a rephrasing of the "intent" element of the *Hartford Fire* test, which would have applied

anyway given the agreements' formation abroad. The Fourth Circuit's only extraneous consideration was the national affiliation of the conspiracy participants, but that consideration pointed in the same direction as the location of the conspiracy's formation and therefore made no difference to the outcome of this case:

> [T]he rubber-thread conspiracy was formulated and furthered at numerous meetings, all of which took place in Southeast Asia, with attendees, all of whom worked for Southeast Asian firms . . . . Only a few of the participants had any United States affiliation, and each of those also had a primary Southeast Asian affiliation.

Pet. App. 27a.

If anything, because Petitioners alleged a conspiracy formed entirely outside the United States, the Fourth Circuit's consideration of national affiliation *was more generous to Petitioners* than warranted by *Hartford Fire*, providing them an additional basis upon which to argue that this was a domestic case. Accordingly, Petitioners' claim that "[r]eview by this Court is necessary to resolve the conflict in the circuits and to provide guidance for the lower courts on the meaning of *Hartford Fire* when mixed U.S.-foreign cartels are challenged," Pet. 15, is misguided: this is not a "mixed" case. It is undisputed that the conspiracy was formed outside the United States. For that reason, *Hartford Fire* applies.

B. Petitioners' parade of horribles is similarly misguided. The Fourth Circuit's opinion will not hamper public or private enforcement. Indeed, the Fourth Circuit's affirmance of the jury's verdict is consistent with the Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (1995), § 3.11 (discussing *Hartford Fire*:

"Whether [U.S. imports] in fact produce the requisite substantial effects will depend on the facts of each case."). If anything, the opinion's dictum would make it easier to establish jurisdiction than warranted by *Hartford Fire*. Pet. App. 24a. ("*McLain* might well apply to . . . a conspiracy, even though the acts that constituted the illegal agreement took place exclusively abroad.").

Petitioners' numbered points at Pet. 18 are equally unavailing. The first two are simply wrong: *Hartford Fire* applied the intended and actual "substantial effect" test to a claim with both foreign and domestic conspirators. 509 U.S. at 795-96. The third point attempts to reduce to absurdity the opinion's dictum—aiming an otherwise "primarily domestic" conspiracy at other markets in addition to the United States will not trigger the *Hartford Fire* test. The fourth point is wrong because the Fourth Circuit did not accord more favorable rights to any Respondent based on foreign ownership, nor did it distinguish between those based here or abroad.

Throughout, Petitioners argue as if the *Hartford Fire* test were somehow fatal to a plaintiff's case (although they did not see it that way as of the fifth day of trial). But in *Hartford Fire* the plaintiffs met the substantial-effect requirement through their allegations of coverage limitations. *Id.* at 795-96. The only difference between *Hartford Fire* and this case is that upon the motions to dismiss in *Hartford Fire*, the allegations of substantial effect were accepted, while in this case *the jurors* obviously did not find that any agreement actually caused higher U.S. prices (the only effect alleged). As the Fourth Circuit recognized, despite Petitioners' failure of proof here, "the federal courts will provide redress for those who can show that the harm of which they complain had a substantial effect on our commerce." Pet. App. 27a. Petitioners' loss at trial was due to a failure of proof, not an insurmountable legal test.

CONCLUSION

Given Petitioners' waivers at trial and on appeal, the correct result on appeal (including affirmance of a fact-bound jury verdict), and the lack of a circuit split, this case does not raise a question warranting this Court's review. The petition should be denied.

Respectfully submitted,

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No. 02-649

IN THE

Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,

Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36.1 of the Rules of this Court, amicus curiae the American Antitrust Institute ("AAI") respectfully moves for leave to file the accompanying brief as amicus curiae in support of petitioner. Petitioner has consented to the filing of the brief; however, counsel for respondent has denied consent.

INTEREST OF THE AMICUS CURIAE

AAI is an independent, non-profit education, research, and advocacy organization concerned with the integrity of antitrust enforcement. Its sixty-member Advisory Board includes four former Assistant Attorneys General for the Antitrust Division of the United States Department of Justice along with numerous distinguished practitioners, law professors, economists, and business leaders.[1]

According to the AAI's own website, its mission is to "increase the role of competition, assure that competition is fair, and challenge unduly concentrated power in the American and world economy." *See* www.antitrustinstitute.org. AAI believes that the decision below substantially undermines both private and government enforcement of the nation's antitrust laws against cartel activity that is harmful to American consumers. AAI perceives a serious danger in the message sent by the Fourth Circuit's decision in this case; namely that foreign-based price-fixing cartels are less susceptible to the reach of the nation's antitrust laws than domestic-based price-fixing cartels. That message is of great concern to the AAI, which instead believes that the nation's antitrust laws should be used to protect U.S. consumers against all price-fixing cartels foreign as well as domestic.

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[1] The members of the AAI's Advisory Board serve in a consultative capacity and their individual views may differ from positions taken by the AAI. None of AAI's Board of Directors nor any of AAI's Advisory Board members involved in preparing this amicus brief represents any party to this litigation.

For the foregoing reasons, the motion of AAI to file the accompanying brief as amicus curiae in support of Petitioner should be granted.

Respectfully submitted.

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BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is described in the preceding motion for leave to file this brief.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In a decision with serious consequences for the reach of the nation's antitrust laws against foreign-based cartels, the Fourth Circuit held that Sherman Act subject matter jurisdiction did not cover a foreign-based cartel with U.S. members that engaged in naked price-fixing on goods sold directly in and into the United States. This inappropriate refusal to invoke Sherman Act jurisdiction over classic per se illegal conduct affecting U.S. interstate and import commerce creates an intercircuit conflict and raises an antitrust jurisdictional issue sufficiently important to warrant this Court's attention.

But the importance of this case transcends that legal issue. The federal antitrust enforcement agencies have made clear their high-priority intent to apply Sherman Act jurisdiction over international cartels that sell to or otherwise affect U.S. buyers. Disagreement among the circuits about the scope and application of Sherman Act jurisdiction ensures that the current debate will go forward until it is resolved by this Court. The Court should review the case to bring greater clarity and certainty to this increasingly important aspect of antitrust jurisprudence.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE TO ANTITRUST LAW

The unsettled questions presented here bear directly upon the reach of Sherman Act jurisdiction over "mixed" national-international cartel activity, which is exceptionally important to the administration of the U.S. antitrust laws in today's global marketplace. International cartels affect tremendous volumes of commerce in the United States. Assistant Attorney General Charles James recently noted the importance of the federal government's continued "success in rooting out international cartel activity, affirming our government's role to protect American consumers from unlawful cartels wherever they base their operations or conduct." *See Recent Developments And Future Challenges At The Antitrust Division*, Remarks by Charles A. James Before The Dallas Bar Association at 7 (September 17, 2002) (www.usdoj.gov/atr/public/speeches/200239.htm).

Assistant Attorney General James also noted the government's clear intention to rely heavily on the full breadth of Sherman Act jurisdiction in order to "send a powerful and unmistakable deterrent message to those around the world who would victimize American consumers and the American marketplace." *Id.* In fact, as the current Deputy Assistant Attorney General for criminal antitrust enforcement has observed, since 1997, the Antitrust Division has obtained over $1.7 billion in fines – many multiples higher than the sum total of all fines for Sherman Act violations dating back to 1890. *See*

Presentation on International Cartel Enforcement, Presentation by James M. Griffin To The American Bar Association at 2 (March 28, 2001) (www.usdoj.gov/atr/public/speeches/8063.htm). Well over ninety percent of these fines were imposed in connection with the prosecution of international cartel activity. *Id.*

Former Assistant Attorney General Joel Klein, much like his successor, noted the exceptional importance of having the necessary tools – jurisdictional and otherwise – to enforce the nation's antitrust laws against international cartels because "people all over the world have come to realize that cartels, and particularly international cartels are a true scourge of the world economy." *See The War Against International Cartels: Lessons From The Battlefront*, Remarks by Joel A. Klein at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy at 1 (October 14, 1999) (www.usdoj.gov./atr/public/speeches/3727.htm). As both former Assistant Attorney General Klein and Professor Areeda have observed, the United States does not stand alone in its views. In fact,"the competition law of the European Community abhors a 'naked' cartel about as much as does United States law." Areeda, *supra*, at ¶ 371 (internal citations omitted); *accord*, Klein, *supra*, at 1.

In short, the federal antitrust enforcement agencies have made clear their intent to push for far-reaching application of Sherman Act jurisdiction over international cartels. Disagreement among the circuits about the scope and jurisdictional reach of the Sherman Act over cartels with foreign aspects threatens this enforcement effort. This Court should resolve this important antitrust jurisdictional issue once and for all.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE THIRD CIRCUIT THAT FLATLY REFUSED TO APPLY THE *HARTFORD FIRE/ALCOA* TEST TO MIXED DOMESTIC AND FOREIGN CONDUCT

1. The Fourth Circuit's decision is in conflict with the decision of another court of appeals that flatly refused to apply the *Hartford Fire/Alcoa* effects test for Sherman Act subject matter jurisdiction to mixed foreign and domestic conduct. Unlike the Fourth Circuit in this case, the Third Circuit refused to apply the *Hartford/Fire Alcoa* test concluding instead that that jurisdictional test was reserved for "wholly foreign" conduct but nothing else. *See, e.g., Carpet Group Int'l v. Oriental Rug Ass'n.*, 227 F.3d 62, 65 (3d Cir. 2000).

The Fourth Circuit essentially acknowledged the conflict with the Third Circuit in *Carpet Group* by resting its contrary ruling on the fact that the Third Circuit's decision was not binding and did not "change" its obligation to follow this Court's precedent in *Hartford Fire*. 299 F.3d at 290-91. The Fourth Circuit's half-hearted efforts elsewhere to distinguish *Carpet Group* on the ground that that case involved "primarily domestic" but nonetheless mixed conduct fell far short. To begin with, the mixed conduct challenged in *Carpet Group* like the mixed conduct challenged here involves some domestic as well as some foreign elements. In both cases, the fundamental question is whether the domestic conduct is enough to invoke Sherman Act jurisdiction over foreign conduct that is part of the same conspiracy. In such cases, either the *McLain* effects test applies, as in *Carpet Group*, or else the more burdensome *Hartford Fire* effects test applies, as the Fourth Circuit saw it. Simply put, the Third Circuit's decision in *Carpet Group* and the

Fourth Circuit's decision in this case cannot be squared with each other.

In a misguided attempt to justify creating a conflict, the Fourth Circuit sharply criticized the *Carpet Group* Court for misapprehending this Court's decision in *Hartford Fire*. 299 F.3d at 291. In the end, the Fourth Circuit rested not on distinctions but on the ground that *Carpet Group* was wrongly decided because it misunderstood *Hartford Fire*. As shown below, however, it is the Fourth Circuit that is out of step, not the Third Circuit in *Carpet Group*. The conflict warrants review.

2. The Fourth Circuit's decision rests on its assessment that the *Hartford Fire/Alcoa* effects test is not limited in its application to wholly foreign conduct. The Fourth Circuit could not have been more wrong.

Both the First and Third Circuits have concluded quite correctly that the *Hartford Fire/Alcoa* effects test applies to wholly foreign conduct but nothing else. *See, e.g., Carpet Group*, 227 F.3d at 75 (*Hartford Fire/Alcoa* effects test applies only to "wholly foreign conduct"); *United States v. Nippon Paper*, 109 F.3d 1, 9 (1st Cir. 1997) (*Hartford Fire/Alcoa* effects test applies only to "wholly foreign commerce"). In fact, that was exactly the winning argument made by the government in *Nippon Paper* and *Carpet Group*. *See, e.g., Brief For United States Of America in Nippon Paper* at 26 (under a "straightforward application" of the *Hartford/Alcoa* test, it applies only to "conspiratorial conduct undertaken wholly abroad"); *accord, Brief For Amicus Curie United States of America in Carpet Group* (cited in *Carpet Group*, 227 F.3d at 74-75).

As the petition explains, the Fourth Circuit concluded that, simply because one of the three conspiracy counts in *Hartford Fire* involved some domestic conduct, the

Hartford Fire/Alcoa effects test applied in all primarily foreign cartel cases like this one. *See* Pet. at 11. In *Hartford Fire*, however, this Court merely observed in passing that the district court "undoubtedly" had jurisdiction over the plaintiffs' Sherman Act claims "as the London reinsurers apparently concede." 509 U.S. at 795. This Court nowhere adopted the sweeping rule adopted by the Fourth Circuit here, namely that the *Hartford Fire/Alcoa* effects test is mandatory in all primarily foreign cartel cases. As the Areeda & Hovenkamp treatise strongly suggests, it is dubious that *Hartford Fire* supports the Fourth Circuit's novel view. *See* IA, Areeda & Hovenkamp, *Antitrust Law*, ¶ 273 ("Indeed, the parties presented no jurisdictional issue to the Court in *Hartford Fire;* rather, the defendant reinsurers 'concede[d]' jurisdiction, but contended that 'the District Court should have declined to exercise jurisdiction under the principle of international comity'").

3. The Fourth Circuit's decision is fundamentally flawed in several respects. First, if allowed to stand, it would seriously jeopardize the government's ability to prosecute foreign-based cartels for price-fixing or other per se unlawful conduct adversely affecting U.S. consumers. At least since *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the price-fixing activity of a cartel has been a per se violation of Sherman Act Section One. Especially when a foreign-based cartel sells goods or services directly in and into United States markets, this Court has long recognized that the Sherman Act applies regardless of whether the cartel activity occurs primarily within the United States, *see United States v. Sisal Sales Corp*, 274 U.S. 268, 274 (1927), or outside its borders, *see Hartford Fire*, 509 U.S. at 769.

Until the Fourth Circuit's decision in this case, Sherman Act coverage over foreign-based cartels depended solely "upon effects felt within the United States" but the "locus of conduct" did not matter at all. Areeda, *supra*, ¶ 272 at 351. For example, almost 100 years ago in *United States v. American Tobacco*, 221 U.S. 106 (1911), this Court concluded that there was Sherman Act subject matter jurisdiction over foreign corporations that refused to sell in the United States in competition with American tobacco producers noting that the conspiracy there charged violated the Sherman Act, "including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination." 221 U.S. at 184. The contracts to which the foreign corporations were parties had been executed in England. *Id.* at 172.

Yet the Fourth Circuit required more than just effects on U.S. commerce to establish Sherman Act subject matter jurisdiction over a foreign-based cartel. It also weighed additional factors including national affiliation, the location of the conduct, and the effects of the conduct on worldwide commerce beyond U.S. commerce. That is not consistent with virtually all of the major litigated international restraint cases decided by this Court which looked to the effects on United States commerce but nothing else. *See, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *American Tobacco*, 221 U.S. at 184; *United States v. Holophane Co.*, 119 F.Supp. 114, *aff'd per curiam*, 325 U.S. 903 (1956).

The Fourth Circuit's unprecedented decision marks the first time a court has found no Sherman Act liability in the face of proof of a foreign-based cartel that fixes the prices of goods sold directly in the United States. The Fourth Circuit's decision produces the perverse and unwarranted result of allowing price-fixers selling

directly into the United States to avoid the reach of the Sherman Act altogether simply by holding meetings outside the United States, conspiring to fix prices not just in the United States but in other parts of the world as well, and acquiring their products from non-American sources. The misguided jurisdictional analysis utilized by the Fourth Circuit here indefensibly discriminates in favor of foreign-based price fixing cartels selling in U.S. commerce while leaving domestic-based price fixing cartels subject to the full coverage of the Sherman Act. This Court should not allow public and private prosecutions against foreign-based cartels to be so seriously weakened. *See, e.g., Reiter v. Sonotone Corp. et al.*, 442 U.S. 330, 344 (1979) ("private [antitrust] suits provide a significant supplement to . . . enforcing the antitrust laws and deterring violations").

4. The Fourth Circuit's decision seriously undermines the bedrock principle that the nation's antitrust laws are designed to protect U.S. consumer welfare. This is because the Fourth Circuit considered factors which have nothing at all to do with the welfare of U.S. consumers: the location of the meetings outside the United States, the foreign nationality of the cartel participants, and the worldwide reach of the price-fixing conspiracy beyond the United States. The Fourth Circuit simply failed to grasp that it is the effect of the conduct on U.S. consumers that ultimately matters above all else under the Sherman Act. To say the least, it is the height of irony for a U.S. purchaser's right of recovery, or the government's prosecution, to turn inversely on how big and successful the cartel is outside the United States. For example, in a case like this one involving approximately $60 million in U.S. sales by the co-conspirators, it simply should not make any difference at all whether the non-U.S. cartelized sales are $6 million, $60 million, or $600 million – U.S. consumers are

harmed exactly the same by the foreign-based cartel's price-fixing regardless of the amount of non-U.S. cartelized sales. Yet under the Fourth Circuit's flawed analysis this makes a world of difference.

5. The Fourth Circuit's decision also unwisely resurrects a flawed "balancing" analysis of a type this Court rejected in *Hartford Fire*. In *Hartford Fire*, this Court reaffirmed the *Alcoa* effects test stating that "it is now well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. The Fourth Circuit's balancing test for Sherman Act jurisdiction is plainly inconsistent with *American Tobacco* as well as *Hartford Fire* which saw no need for balancing once the requisite commercial effects are established. Furthermore, as the petition explains, the Fourth Circuit's balancing test is rife with problems. *See* Pet. at 18-19.

6. In the AAI's view, the Fourth Circuit should have applied the *McLain* effects test rather than the *Hartford Fire/Alcoa* effects test for Sherman Act subject matter jurisdiction. Under the *McLain* test, a price-fixing plaintiff must demonstrate only "that the defendants' activity is itself in interstate commerce" or "'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved.'" *McLain v. Real Estate Bd.*, 444 U.S. 232, 242, 246 (1980) (*quoting Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 745 (1976)). As the Areeda treatise explains, this "effects test can generally be established simply by showing that the naked price-fixing exists and that a substantial number of sales were made to United States buyers." Areeda, *supra*, ¶ 273 at 371. That is exactly the case here. Respondents directly fixed prices for the sale of rubber thread in the United States market and sold

approximately $60 million dollars worth directly to U.S. interstate and import buyers through their agents and co-conspirators.

7. In any event, the Fourth Circuit should have found Sherman Act subject matter jurisdiction even under the *Hartford Fire/Alcoa* test. The Fourth Circuit failed to grasp that "*Alcoa* itself did not actually hold that significant or any other effects were a prerequisite to Sherman Act coverage, once an intention to affect United States commerce was established." Areeda, *supra*, ¶ 272f at 354. As the petition correctly points out, where, as here, intent to affect the United States is proved, the *Alcoa/Hartford Fire* test does not require that plaintiffs establish a substantial effect on commerce, but rather puts the burden of showing no effect on commerce on defendants. *See* Pet. at 11. The Fourth Circuit, however, put no such burden on respondents.

8. The Fourth Circuit's decision is not just inconsistent with this Court's decisions in *Hartford Fire* and *Alcoa*, it is also out-of-step with the views of the federal government antitrust enforcement agencies. For example, the Department of Justice and Federal Trade Commission Guidelines even claim jurisdiction over a foreign cartel that makes no sales into the United States directly but that sells to an intermediary with the knowledge that the latter intends to resell into the United States. *See Revised Antitrust Enforcement Guidelines for International Operations*, § 3.13 (1995). The DOJ and FTC Guidelines also express the view that in the case of a foreign cartel with substantial sales into the United States, Sherman Act "subject matter jurisdiction is clear under the general principles of antitrust law most recently expressed in *Hartford Fire*." *Id.* at § 3.11. Yet the Fourth Circuit took the opposite view in this case, allowing a jury to opine on whether $60 million was

substantial compared to the effect of other factors such as the antitrust dumping laws.

This Court should grant the petition to clarify the implications of its embrace of *Alcoa* in *Hartford Fire* and to bring the Fourth Circuit into line with the views of the government and the Third Circuit in *Carpet Group*.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OVERVIEW

This Overview sets the context for Petitioners' responses to the Opposition of Respondents, which follow.

The fundamental error of the decision below – and of the Respondents' Brief in Opposition supporting it – is a failure to appreciate that the extraterritorial application of United States law is the exception, and not the rule. When, as here, personal jurisdiction is uncontested, Pet. App. 5a, and the undisputed facts establish subject matter jurisdiction, a district court *must* exercise jurisdiction over the defendants and the claims. *See e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

The jury found that the Respondents (one of which is a Malaysian corporation registered to do, and which conducts, business in North Carolina), a North Carolina corporation, and others had conspired to fix the prices of extruded rubber thread, which was intended to have a substantial effect on the United States. Pet. App. 7a. Given the undisputed interstate sales of extruded rubber thread, *see, e.g.,* Opp. Br. at 22 ("Here . . .the conspirators allegedly [*sic*] fixed the price of a product sold in the United States."), the district court had subject matter jurisdiction under 28 U.S.C. § 1331 over the Petitioners' Sherman Act claims. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242-43 (1980) (jurisdiction over Sherman Act claim established by "evidence . . . that the defendants' activity is itself in interstate commerce").

The district court erred by granting defendants judgment when the Petitioners failed to persuade the jury (over their objection to the relevant instructions) of the existence of an element necessary for an *extraterritorial* assertion of Sherman Act jurisdiction – a "substantial effect" on the United States. *Id.* 7a. But resort to extraterritorial

application of Sherman Act jurisdiction was error because the defendants' activities were in interstate commerce and, thus, federal question subject matter jurisdiction over the Petitioners' antitrust claims had been established.[1]

The Fourth Circuit compounded the district court's error by creating a new "primarily foreign or primarily domestic" test and by conjuring up an inquiry "more flexible and subtle," Pet. App. 24a, than the "bright-line" test of *McLain, id.*, for district courts to use in determining subject matter jurisdiction. *Id.* 25a. If the balance of these undefined factors[2] points, like the planchette of an Ouija board, toward a "primarily foreign" conspiracy, then subject matter jurisdiction is established pursuant to the more burdensome extraterritorial standards of *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993), and the case it approvingly cited, *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*") – whether or not subject matter jurisdiction could be established under the less burdensome constitutional standards of *McLain*. On this dubious basis, the Fourth Circuit affirmed the district court.

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[1] Subject matter jurisdiction over a Sherman Act claim has a constitutional basis: proof of the defendants' nexus to interstate commerce is required because that legislation was passed pursuant to the Commerce Clause. *McLain*, 444 U.S. at 241. As this Court has recognized an increasingly expansive reach of congressional power pursuant to that clause, the reach of the Sherman Act has expanded "correspondingly." *Id.*; *see also United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 558 (1944) (" That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt.").

[2] *Id.* ("the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction" should be considered).

As explained in the Petition at 22, and as also discussed in the brief submitted by the American Antitrust Institute as *amicus curiae*, the issues presented in the Petition are fundamental to the effective enforcement of antitrust laws against conspiracies that include foreign aspects. Review by this Court is essential to promote uniform enforcement and to correct the growing disarray in the circuits. The outcome of this case – exoneration of domestic companies that sold in interstate commerce a product, the price of which a jury found had been fixed by their conspiracy – speaks louder than any conjecture about future consequences of this error.

REPLY TO RESPONDENTS' ARGUMENTS

Respondents' arguments against Certiorari should be rejected because: (1) as the Fourth Circuit recognized, Petitioners waived neither of the questions they present for review; (2) *Hartford Fire*'s discussion of *Alcoa* did not adopt, mandate, or even suggest the Fourth Circuit's jurisdictional balancing test; and (3) there is a real conflict among the circuits that will affect all mixed U.S.-foreign cartel cases.

I. Petitioners Did Not Waive Any Theory Upon Which Review Is Sought Of The Decision Below.

The decision below would not have issued had Petitioners waived or otherwise failed to preserve the issues decided therein. Petitioners now seek review of the issues explicitly considered and decided by the Fourth Circuit.

Clearly, the first Question Presented in the Petition is squarely raised and addressed in the Fourth Circuit's decision, *see, e.g.*, Pet. App. 3a ("The purchasers appeal, principally contending that the substantial-effect test applies only to 'wholly' foreign conduct, and so does not govern this case because the rubber thread conspiracy resulted in the sale of price-fixed goods directly into the United States."). That

issue was preserved for the Fourth Circuit's (and this Court's) review by Petitioner's timely objections to the jury instructions. *Id.* 7a.

The Fourth Circuit never stated or implied that any principal contentions of the Petitioners had been waived. In one footnote the court stated that the Petitioners had waived the specific argument "that the district court should have applied" a *Hartford Fire* test incorporating a "lesser effects" standard (or a different formulation of the test applicable to the extraterritorial application of the Sherman Act). *Id.* 15a n.5.[3] But Petitioners are not seeking review of this point; rather, they seek review to correct the fundamental error of the Fourth Circuit in permitting district courts discretion to impose the extraterritorial test of *Hartford Fire* after subject matter jurisdiction of a Sherman Act claim had already been established by the defendants' activity in interstate commerce, and in holding that evidence of such interstate sales would fail to satisfy whatever effects test might be applicable.[4]

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[3] Petitioners' Questions Presented include the primary question answered below – whether the effects test is applicable at all, not whether the standard for that test is "substantial" or "some" effect. The Fourth Circuit's comment that the latter issue was waived serves only to confirm that the primary issue had not been waived.

[4] Even accepting *arguendo* Respondents' first waiver argument – that Petitioners' statements initially led the district court towards giving erroneous instructions – those facts do not waive the right to appeal the same instructions when, as here, timely objections have been asserted. C. Wright & A. Miller, 9A *Federal Practice & Procedure* (1995) § 2558 at 471-72 ("if the party recognizes the error into which it has led the court, and seeks to rectify it by objecting to the instruction when it is given, it may have appellate review of the instruction") (citing cases).

The "subject to jury determination" clause of Petitioners' second Question Presented incorporates whether the jurisdictional issue should have been given to the jury in the first instance and whether a jury's erroneous jurisdictional finding is binding on the court. Petitioners preserved this compound question by objecting to the district court's failure to give their proposed jury instructions, Pet. App. 38a, which excluded "substantial effects" issues and instructed that it was undisputed that the products at issue moved in interstate commerce, C.A. 3663. Moreover, under *Alcoa* and as explained in the Areeda treatise, *see* Pet. at 20, once, as here, the jury found a price fixing conspiracy aimed at the United States, the district court could be divested of Sherman Act jurisdiction only because of a complete absence of U.S.-related sales. The Fourth Circuit's conclusion that the jury's "no substantial effect" finding was sustainable by evidence of antidumping and cost pressures was legally irrelevant because such factors go to motive and do not negate the undisputed U.S. sales, which established subject matter jurisdiction. Plaintiffs appealed on these grounds, as well as on the authority of the cases cited in the Petition at 19-22, which hold that a jury's finding of no effect must be reversed whenever, as here, it is legally untenable under the admitted facts, regardless of when or how the Petitioners raised the error. All the cases hold that an untenable finding of no U.S. commerce must be reversed if raised on appeal. The cases cited by Respondents, Opp. at 9-11, do not address these issues or the relationship between related verdicts.

II. The *Hartford Fire* Opinion Does Not Compel Either Of The Fourth Circuit's Holdings

Respondents assert that *Hartford Fire* compelled the Fourth Circuit's holding. Opp. Br. 12-19. Respondents premise their argument on one assertion – rejected even by the court below – that the "situs of the conspiratorial agreements at issue" determines whether subject matter

jurisdiction of a Sherman Act claim is to be established under the constitutional standards of *McLain* or under the extraterritorial standards of *Hartford Fire*. Respondents' argument circularly presumes that *Hartford Fire* applies to the facts of this case – which is, of course, the principal issue for which review is sought in the first instance.

Hartford Fire, of course, did not compel the Fourth Circuit's erroneous holding because it did not formulate a "primarily foreign" test and because subject matter jurisdiction was undisputed when extraterritorial jurisdiction was addressed. 509 U.S. at 784, 795 (with respect to case no. 91-1128, "we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede").[5]

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[5] The Fourth Circuit assumed that because "some of the participants in one of the conspiracies alleged in *Hartford Fire* were entities based in the United States," citing *In re Ins. Antitrust Litig.*, 938 F.2d 919, 922-23, 929 (9th Cir. 1991), Pet. App. 18a, "*Hartford Fire* itself severely undercuts Dee-K's claim that the substantial-effect test applies only to 'wholly' foreign conduct." *Id.* The Fourth Circuit overlooked the fact that *Hartford Fire* involved two separate sets of parties in two consolidated appeals. 509 U.S. at 764. This Court's statement regarding jurisdiction quoted above applied only to the "foreign defendants" who argued "that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it," 509 U.S. at 769, and the statement did not apply to the "domestic defendants," *id.*, who were involved in related claims that were the subject of the consolidated appeal in No. 91-1111. Moreover, this Court's statement that the test for extraterritorial application of the Sherman Act was satisfied with respect to these defendants in no way implies that subject matter jurisdiction could not have been established through the interstate activities of their co-conspirators.

Moreover, the terse statement in *Hartford Fire*, which applied to foreign defendants, did not revoke or undermine *McLain's* reaffirmation that subject matter jurisdiction in Sherman Act cases is established upon proof that "the defendants' activity is itself in interstate commerce." 444 U.S. at 242. In this case, the defendants admitted their interstate activities in their answers to the Complaint and proof of their interstate sales was undisputed at trial. Finally, the *Hartford Fire* opinion does not deal with the presumption of substantial effect that *Alcoa* teaches and that the Justice Department and treatises endorse for use when non-minimal U.S. sales are present. *See* Pet. at 11, 16-17.

Respondents assert that because the Fourth Circuit's criterion for employing the extraterritorial test of *Hartford Fire* (that is, "primarily foreign" conspiracies) is compelled by that case, certiorari is not justified. But, as was addressed in our Petition at 14-17 and will be explained in more detail below, both the First and Third Circuits, with the support of the Justice Department, have taken the position that the *Hartford Fire* criterion for imposing extraterritorial jurisdiction is "wholly foreign" conduct, not "primarily foreign" conduct. Respondents' argument supports certiorari by implicitly acknowledging the potential for continued misunderstanding of this Court's intentions in *Hartford Fire*.

Respondents assert that the "jury's fact-bound verdict [of no substantial effect] was not against the weight of the evidence," Opp. at 15, because antidumping duties and/or latex prices accounted for the rubber thread price increases. Respondents' Counter-Statement of the Case, Opp. at 1-6, emphasizes the evidence that Respondents characterize as showing "that Respondents' U.S. prices were not the result of a conspiracy." *Id.* at 6. Even were that characterization to be accepted, the district court would not have been stripped of subject matter jurisdiction. Because the jury found the Respondents to have conspired to fix U.S. prices,

and because their interstate sales were not disputed, subject matter jurisdiction existed for the district court to grant the Petitioners injunctive relief even if the jury held that the conspiracy had failed to achieve its goals:

> If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. . . . Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief.

McLain, 444 U.S. at 243 (citations omitted).

III. The Fourth Circuit's Holding Conflicts With The Rule Now In Effect In The First And Third Circuits

Respondents attempt to argue that there is no conflict between the decision below and the First and Third Circuit's treatment of subject matter jurisdiction in *United States v. Nippon Paper Industrial Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers' Ass'n*, 227 F.3d 62 (3d Cir. 2000). Respondents argue that this case and *Nippon Paper* only involved foreign conduct, and *Carpet Group* involved domestic conduct. Opp. at 19-23. Respondents' quotation of the key passage from *Carpet Group*, however, undermines their argument:

> *McLain* controls when subject matter jurisdiction over domestic conduct is at issue. We reject the defendants' reliance on

> *Hartford Fire*, because it dealt exclusively with the extraterritorial applicability of the Sherman Act to *wholly foreign conduct*.

Carpet Group, 227 F.3d at 75 (*quoted in* Opp. at 21-22) (emphasis added); *also compare Nippon Paper*, 109 F.3d at 9 (*Hartford Fire* permits jurisdiction over "wholly foreign conduct") *with* Pet. App. 17a (suggesting "wholly foreign conduct" was "shorthand" and dicta).

Because the Respondents conceded their interstate activities, and because those interstate activities are the only predicate for subject matter jurisdiction, *McLain*, 444 U.S. at 242, they have, in effect, conceded that the Fourth Circuit is in conflict with *Carpet Group*. *Carpet Group* acknowledged that *Hartford Fire* applies to an extraterritorial application of the Sherman Act – something that is not required here, because subject matter jurisdiction over Petitioners' claims was established when the Respondents' import and interstate sales activities was undisputed.

In any event, the Third Circuit's discussion of the Justice Department's *amicus* brief demonstrates its agreement with the government's reading of *Hartford Fire* and disagreement with the position of the Fourth Circuit. *Carpet Group*, 227 F.3d at 73. Future cases presenting this issue that arise in the Fourth or Third Circuit are likely to come out differently unless this Court resolves the split among the circuits.

CONCLUSION

Regardless of the rhetoric or debate about evidence, the two reasons for review presented here remain simple, fundamental and important. The first reason for review is that the Third and First Circuits have ruled that the *Hartford Fire/Alcoa* substantial effect on U.S. commerce test is a necessary burden for antitrust plaintiffs only when all the

significant conduct occurs abroad, while the Fourth Circuit has ruled that such burden must be met whenever the offshore conduct is greater than that which occurs onshore. Clearly, the treatises and weight of academic authority agree with the Third and First Circuits, *see* Pet. at 11-20.

The second reason is that, although numerous decisions hold that a substantial effect on U.S. commerce test when appropriate is met with proof of a price fix, intent to affect U.S. commerce, and non-minimal imports or interstate sales, the Fourth Circuit holds that substantiality is a jury question and that a negative finding despite undisputed imports and interstate sales can be justified because the jury may compare the effect of the price fix to the effects of other factors on price. *McLain,* the Areeda treatise, the Government's international antitrust guidelines, and numerous other authorities agree with the position opposite that of the Fourth Circuit.

For the foregoing reason and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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IN THE
Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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Pursuant to Rule 15.8, petitioners file this supplemental brief to address two recent developments: (1) the amicus brief of the United States and the Federal Trade Commission submitted on May 27, 2003 ("Gov't Br."); and (2) the recent decision in *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003), submitted to this court by letter on April 4, 2003.

The government's brief agrees with the key points of the petition: (1) that the Fourth Circuit established a new and "wrong test [for] determining" the fundamental issue whether certain price-fixing conduct comes within the reach of the Sherman Act (Gov't Br. 6); 2) that the Fourth Circuit's decision directly conflicts with this Court's jurisprudence — in particular, with *McLain v. Real Estate Board*, 444 U.S. 232, 242 (1980) (Gov't Br. 6-9); and 3) that the record evidence cited by petitioners, and "not disputed by respondents," is "sufficient to establish jurisdiction under *McLain*" (Gov't Br. 9-10).

The government, however, argues that the Fourth Circuit's fundamental error does not merit "plenary review" for two reasons. Gov't Br. 6, 10. First, it contends that the evisceration of this Court's decisions on subject matter jurisdiction and the *per se* rule does not warrant plenary review unless there is a conflict in the circuits between two cases with indistinguishable facts. Second, because petitioners offered an effect on prices instruction before timely objecting to (and later appealing) the erroneous instruction and special verdict that were given, as well as the dismissal based on that special verdict, petitioners allegedly did not make their arguments to the district court "with sufficient clarity . . . to warrant this Court's review." *See* Gov't Br. 6. These reasons are specious. The Fourth Circuit has decided incorrectly a question of broad importance, in conflict with decisions of this Court and other courts of appeals, and review by this Court is just as warranted in this

private suit as it would be if the issue arose in a government antitrust suit.

1. The government's brief cogently confirms the merits of petitioners' first asserted ground for certiorari — a direct conflict with this Court's own decision in *McLain* and with the seminal decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (essentially adopted by this Court in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)). Gov't Br. 7-8. Even in the absence of a conflict with more recent court of appeals decisions, this Court should nip in the bud such a rejection of its own precedent on a fundamental question of antitrust law that allows a *per se* violation to go unpunished. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).[1]

2. In any event, there exists a conflict with recent decisions from other courts of appeals that independently warrants this Court's review. Even if the government were correct that this case does not present a "clear conflict" between cases with indistinguishable fact patterns (*see* Gov't Br. 10), this should not militate against review by this Court in the circumstances here. The government agrees that the Fourth Circuit's decision establishes a new and "wrong" jurisdictional test (Gov't Br. 6), and it acknowledges that the First and Third Circuits have set forth the correct test established by this Court (Gov't Br. 11-12). This conflict in interpreting *Hartford Fire* alone justifies this Court's review.

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[1] If the Court agrees with the government that this case "does not merit this Court's *plenary* review" (Gov't Br. 6, 10 (emphasis added)), the conflict with this Court's decisions is sufficiently clear, and the issue is of sufficient importance, that the appropriate course of action would be summary reversal, not denial of certiorari.

See, e.g., *United States v. Gaddis*, 424 U.S. 544, 547 (1976). Accordingly, as leaders of the antitrust bar have already recognized and stated in an amicus brief, there clearly exist circumstances that call for this Court's intervention — similarly situated plaintiffs who sue foreign price fixers will face significantly different burdens of proof depending upon whether they are in the Fourth Circuit or another circuit. *See ABA International Antitrust Bulletin*, Fall 2002, at 1 (noting Fourth Circuit decision and commenting that "[w]e anticipate that this unsettled area will continue to cause divisions among courts").

Moreover, even if one focuses exclusively on the holdings of the courts, the government is simply incorrect in stating that there is no "conflict in the circuits on the question presented." Gov't Br. 1. The question presented, as stated by the government, is whether the jurisdictional test for a Sherman Act case against a global cartel that makes substantial sales in interstate commerce "is governed by *McLain* . . . or by *Hartford Fire*." Gov't Br. I. In other words, is the jurisdictional requirement satisfied by showing that "the defendant's activity is itself in [domestic] interstate commerce" (Gov't Br. 8 (quoting *McLain*, 444 U.S. at 242)) or must the plaintiff also show that the activity caused "substantial domestic effects" (Gov't Br. 7 (citing *Hartford Fire*, 509 U.S. at 796))? This is the question that was presented to the Third Circuit in *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), and that court definitively resolved the issue contrary to the Fourth Circuit's decision in this case. *Carpet Group* sets out standards governing the jurisdictional reach of the Sherman Act and the *per se* rule in that circuit, and it establishes a clear conflict in the circuits on the question of when *McLain* governs or, alternatively, when an *Alcoa/Hartford Fire* burden must be met.

In *Carpet Group*, the trial court dismissed the plaintiffs' case for failure to prove that the defendants' actions "substantially affect[ed] United States commerce. 227 F.3d at 64. Thus, the appeal presented the same issue that was presented to the Fourth Circuit — namely, whether plaintiffs were required to make that *Hartford Fire* substantial effect showing. *Id.* at 73. The Third Circuit held that the governing test was provided by *McLain*, not by *Hartford Fire*, because *Hartford Fire* "dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Id.* at 75. Therefore, the *Carpet Group* plaintiffs were required to show only that "'the defendants' activity is itself in interstate commerce'" and "no 'effects' test even comes into play." *Id.* (quoting *McLain*, 444 U.S. at 242). The Third Circuit thus resolved the precise question presented in the government's brief in direct conflict with the resolution of that issue by the Fourth Circuit; in the Third Circuit, the *Hartford Fire* substantial effect test does not apply except in the case of "wholly foreign conduct."

The ruling that *McLain* governs was the Third Circuit's holding, not "dicta"; it is the government that relies on dicta when it focuses on the Third Circuit's observation that the conduct in *Carpet Group* occurred primarily in the United States. *See* Gov't Br. 11. This Court should grant certiorari to ensure a strong, consistent U.S. policy against offshore cartels that victimize U.S. consumers and to standardize the jurisdictional reach of the Sherman Act and the *per se* rule throughout the circuits.

3. The government also asserts that, even if this case otherwise warrants Supreme Court review, this Court should deny certiorari because of "[a]dditional considerations." Gov't Br. 12. These "considerations" largely consist of a single point that has never been raised by respondents — not at trial, not on appeal, and not in their brief in opposition. The government states that certiorari is inappropriate

because petitioners once proposed a jury instruction (rejected by the trial court) that went beyond *McLain* in that it instructed the jury to consider whether the price-fixing conspiracy affected U.S. price levels. The government's argument that this fact impedes appellate review is inconsistent with hornbook law, unsupported by the cited authorities, and plainly irrelevant here where the major error is not the instruction itself but the dismissal after petitioners prevailed on the price-fixing verdict.

There is no dispute that petitioners timely and vigorously objected to (and appealed) the erroneous jury instructions, the giving of the second special verdict, and the refusal to ignore or overturn it. *See* Pet. App. 36a-38a. Thus, even if petitioners had suggested an *identical* instruction (and in fact petitioners' proffered instruction was significantly different from the one given to the jury), that would not affect petitioners' ability to pursue the merits of their appeal, and it is entirely irrelevant to this Court's certiorari determination.[2] It is hornbook law that, if a party suggests an erroneous instruction, but then rectifies the error "by objecting to the instruction when it is given, *it may have appellate review of the instruction.*" 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2558, at 472 (2d ed. 1995) (emphasis added); *see General Beverage Sales Co. v.*

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[2] The instruction once suggested by petitioners stated that respondents' sales in commerce were not disputed and asked the jury to decide whether the conspiracy "affected the U.S. price" of rubber thread. C.A. App. 3663. The instruction given by the court, over petitioners' objection, required the jury to find a "'substantial effect' on the U.S. market," not an effect on price. C.A. App. 1352-53. Even standing alone, these key phrases are not similar, and the instructions as a whole were even more different.

East Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978); *Alabama Great Southern R. Co. v. Johnson*, 140 F.2d 968, 970-73 (5th Cir. 1944).[3]

The government invokes two cases to support its assertion that petitioners' proposed, but rejected, instruction counsels against granting review (Gov't Br. 12-14), but both of these cases in fact point to the opposite conclusion. In *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), the Court dismissed a writ of certiorari as improvidently granted because petitioner "did not object to the jury instruction" at issue, contrary to the requirement of Fed. R. Civ. P. 51. *Id.* at 258, 259. The Court also noted that the certiorari "petition did not explicitly present the . . . question, and it had not been addressed" by the court of appeals. *Id.* at 260. Here, by contrast, petitioners fully complied with Rule 51 by timely objecting to the relevant instruction, the question was clearly presented in the petition, and it was the focus of petitioners' appeal and of the court of appeals decision. *Kibbe* certainly does not suggest that certiorari is inappropriate where there is no Rule 51 issue. *See United States v. Wells*, 519 U.S. 482, 488 n.6 (1997); *United States v. Williams*, 504 U.S. 36, 43 n.3 (1992).

The government also relies on *Wells*, which even more clearly contradicts its position. In that case, the petitioner arguably "invited error" by proposing an instruction that was

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[3] Moreover, given that petitioners timely objected to the instructions and appealed on that basis, the government's objection would have to rest on some kind of nonjurisdictional estoppel theory. But there is no claim of prejudice, and this Court has repeatedly held that nonjurisdictional procedural objections will not deter consideration of the merits if not raised in the brief in opposition. *Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

given to the jury and then arguing to this Court a position inconsistent with that instruction. The Court nevertheless declined to dismiss the case, applying its "traditional rule that we may address a question properly presented in a petition for certiorari if it was 'pressed [in] or passed on' by the Court of Appeals." *Id.* at 488 (citation omitted). Here, petitioners did not "invite error" because they rectified their position by clearly advising the trial judge that *McLain*, not *Alcoa/Hartford Fire*, should govern, and they timely objected to the erroneous instruction in the trial court. Indeed, petitioners objected to seven different instructions containing the "substantial effect" on U.S. commerce language, objected to the special verdict form, and argued post-trial and on appeal that the instructions and special verdict were erroneous. *See* Pet. App. 36a-38a. It follows *a fortiori* that there is no impediment here to granting certiorari and correcting the fundamental error of the Fourth Circuit.[4]

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[4] There is no basis for the government's suggestion that "the facts are not entirely clear" that there was sufficient domestic commerce to justify a *McLain* instruction. Gov't Br. 9. Respondents never disputed the scope of their interstate commerce. They stipulated to the authenticity of their business records, which were the primary evidence on this topic, and agreed not to introduce "documentary or testimonial evidence from Malaysia" to contradict those records. *See* C.A. App. 190-92. The government also incorrectly asserts that petitioners "did not articulate to the district court that, under *McLain*, the Sherman Act applied to the alleged conduct to the extent that it involves domestic commerce." Gov't Br. 12. In fact, petitioners argued precisely that point in a separate brief filed during the trial. *See* Pls.' Mem. of Law Regarding *Hartford Fire* (Mar. 9, 2001; Dkt. No. 233) at 2 ("Such companies' U.S. sales are unquestionably domestic conduct, so the usual 'affecting commerce' threshold of Sherman Act jurisdiction applies to them.").

Moreover, the trial court's entry of judgment for respondents was plain error in light of *McLain*. Where the *McLain* test applies, at least in civil cases, the plaintiff prevails after a jury verdict finding that the goods moving in interstate commerce were subject to a price fix, and a jury finding of no effect on commerce is superfluous and should be nullified when challenged by post-trial motion or on appeal. *Gough v. Rossmor Corp.*, 487 F.2d 373 (9th Cir. 1973); *see also Wirtz v. Lafitte,* 326 F.2d 856 (5th Cir. 1964).

4. The government expresses no opinion on the merits of the second question presented — namely, assuming arguendo that a *Hartford Fire* substantial effects inquiry was appropriate, was it correct to make the jury the final arbiter of that issue. The government simply asserts that this issue is not properly presented because petitioners failed to raise it in a Rule 50 motion before the trial court. Gov't Br. 14-15. That assertion is mistaken and provides no reason for failing to consider an issue of recurring importance on which the circuits are in conflict.

The lower courts' rejection of petitioners' position on this point rests on the incorrect assumption that the effects test is an element of the claim that the jury must determine, even if substantial commerce is admitted. In other words, the courts treated the issue as one of fact on which the jury's verdict can be overturned only if there is no evidence to support its conclusion. But as this Court noted in *Hartford Fire* (509 U.S. at 796 n.22), the effects test is a prerequisite of "subject matter jurisdiction," and courts are thus empowered to determine when undisputed facts satisfy this jurisdictional requirement. A Rule 50 motion is a prerequisite to a post-trial challenge or appeal only when a fact issue is reserved for the jury. *See Burke v. Ford*, 389 U.S. 320 (1967); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d at 946; *Gough v. Rossmor Corp.*, *supra*; *Wirtz v. Lafitte*, *supra*.

The Seventh Circuit decision in *United Phosphorus* specifically addresses this issue and concludes that the effects issue is for the court, not for the jury: "[T]he power of the courts is precisely what subject matter jurisdiction is about. For all of these reasons, we find that the district court properly treated the [effects] issue as one of subject matter jurisdiction." 322 F.3d at 952. In *United Phosphorus*, plaintiffs' own expert testified that U.S. sales of the affected product would be "less than substantial," and thus no jurisdiction was found. Here, it is undisputed that the cartel sold 50 million pounds of rubber thread into U.S. commerce at between $1.10 and $1.80 per pound, and the government acknowledges that this evidence is sufficient to establish jurisdiction. *See* Gov't Br. 9-10; *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 501-02 (1969).

The Fourth Circuit treats subject matter jurisdiction as a nearly non-reviewable jury question. The Seventh Circuit says effect on commerce is a legal question for the court, and not a jury question when substantial commerce is undisputed, as was held in *Fortner*. Thus, there is a split in the circuits regarding the role of the jury in substantial effect cases. This split would justify review even if the evisceration of the *McLain* rule and overextension of *Alcoa* did not.

CONCLUSION

Unless this Court acts, two small family-owned U.S. businesses that unmasked a worldwide price-fixing cartel will have to pay over $60,000 in taxable costs to the cartel's leaders. The government agrees with petitioners that those defendants were exonerated only because of the Fourth Circuit's erroneous nullification of this Court's decision in *McLain*. What kind of message would such a result send to multinational price-fixers, or to Americans thinking about taking on an international cartel? And why should this Court leave unresolved a situation in which cartel defendants will

have a powerful incentive to seek haven in the Fourth Circuit, where *Alcoa* tests will often shield mixed cartels and jury findings of no substantial effect are treated as unchallengable, regardless of sales, prices, or profits?

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Pursuant to Rule 15.8 of the Rules of this Court, Respondents file this supplemental brief to address new issues raised in (1) the *amicus curiae* brief of the United States and the Federal Trade Commission ("Gov't Br."), and (2) Petitioners' supplemental brief ("Supp."). Respondents incorporate by reference the Rule 29.6 Corporate Disclosure Statement set forth in their Brief in Opposition.

ARGUMENT

The Government and Respondents agree that "[t]he petition for a writ of certiorari should be denied." Gov't Br. 15; Opp. 25.

1. The Government and Respondents agree that the Fourth Circuit's decision neither implicates nor creates a conflict among the circuits. *See* Gov't Br. 11-12 (distinguishing *Carpet Group* and *Nippon Paper* and concluding that "there is no clear conflict calling for this Court's review"); Opp. 19-23 (arguing that *Carpet Group* and *Nippon Paper* are consistent with this case).

Petitioners' new argument that *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), conflicts with the decision below, Supp. 9, is incorrect. The issue in that case—whether the effects test under the Foreign Trade Antitrust Improvement Act ("FTAIA") goes to subject-matter jurisdiction or the merits, 322 F.3d at 944—is not implicated by the petition because this is not a FTAIA case. Also, rather than early dismissal of their claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure, here Petitioners received a full trial on the merits. *See* Pet. App. 27a (Fourth Circuit noting that the district court did not dismiss Petitioners' case and that they had their "day in court").

Petitioners also rely on *United Phosphorus* to argue that the district court's submission of the "substantial effect" issue to the jury was incorrect. Supp. 8-9. The Government

and Respondents agree that this question "is not properly before this Court." Gov't Br. 14; *see* Opp. 6 (arguing that Petitioners repeatedly failed to remove the question from the jury at trial and waived the argument before the court of appeals); Pet. App. 7a n.1 ("Dee-K does not appeal the denial of its Rule 50 motion."); *cf. United States v. Williams*, 504 U.S. 36, 42 (1992) ("[W]e will not review a question not pressed *or* passed on by the courts below.") (quotation omitted). Nevertheless, Petitioners contend that only a court has the power "to determine when undisputed facts satisfy th[e] jurisdictional requirement." Supp. 8. The facts of this case, however—whether acts of price fixing occurred in the United States—were hotly disputed. Moreover, far from being "non-reviewable," Supp. 9, the jury's verdict has been reviewed for error twice—by the district court and by the court of appeals. *See* Opp. 5-6 (discussing the district court's and the court of appeals' review of the verdict). At bottom, because Petitioners received the trial they sought in the first instance, they cannot fairly claim to have been prejudiced by the jury's consideration of the question.

2. The Government and Respondents agree that Petitioners' proposed jury instructions render this case an inadequate vehicle for certiorari review. *See* Gov't Br. 12-13 (citing C.A. App. 3663 and arguing that Petitioners' final proposed jury instruction was "*inconsistent* with *McLain* [*v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)]," was "not a correct statement of the law" because it gave the effects issue to the jury, and was "not materially different from the instruction actually given"); Opp. 7 (citing C.A. App. 3663 and describing Petitioners' assignment of the effects issue to the jury). Petitioners incorrectly suggest that a new *McLain* instruction would have led to a different result, although as the Government argues, it is not "clear that petitioners would have prevailed had the court instructed the jury" as they now propose. Gov't Br. 13.

Contrary to Petitioners' contention, their objection to the jury instructions was not "timely." Supp. 5. Petitioners did not object to an instruction under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), until after they had requested that the case be tried under *Hartford Fire*, and after the trial was halfway over. *See* Opp. 8 (discussing Petitioners' reversal after day five of an eight-day trial). Petitioners make the conclusory assertion that Respondents would not have been prejudiced by Petitioners' failure to timely object, Supp. 6 n.3, yet Petitioners fail to explain how their proposed change in jury instructions late in the trial would not have been prejudicial. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and *indeed itself requested*.") (emphasis added).

3. While opposing a writ of certiorari, the Government argues that the court of appeals used the wrong test to reach the correct result, and Petitioners seize upon this argument. Gov't Br. 6; Supp. 2. Both are mistaken. The "conduct" proscribed by the Sherman Act are anticompetitive acts of agreement, not whatever acts follow the agreement. *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) ("[T]he essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it . . . ."), *quoted in Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398-99 (2d Cir. 2002) (holding that the illegal act "was *not* the imposition of high prices, but the formation of the agreement") (emphasis added); Opp. 14-15 (proving that under the facts of *Hartford Fire*, "conduct" equals "agreement").

The Government's and Petitioners' focus on Respondents' sales into the United States as a determinant of the jurisdictional test, Gov't Br. 9-10; Pet. 21, cannot be reconciled with *Hartford Fire*. *See* 509 U.S. at 770, 779, 795-96, 819 n.10 (focusing on "foreign conduct" in spite of the presence of U.S. co-conspirators, overt acts in furtherance in the United States, and sales of affected insurance policies into and within the United States); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (observing that agreements were concluded abroad); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (noting that agreement was reached in Japan); Opp. 15-17 (discussing divergence of tests for foreign and domestic agreements). The Fourth Circuit applied *Hartford Fire* simply because "the agreements here were all formed entirely outside the United States," like those in *Hartford Fire*. Pet. App. 26a.

In any event, whether a "substantial effect" or "jurisdictionally significant" test is applied to this case, the result is the same because the jury did not believe that the alleged conspiracy affected price levels in the United States. *See* Gov't Br. 13 ("[T]he jury's verdict appears to reject petitioners' argument that the conspiracy actually affected price levels in the United States."); Pet. App. 7a n.1 ("the producers provided the jury with a good deal of evidence supporting the challenged finding" that price-fixed goods were not sold in U.S. commerce).

Finally, Petitioners cannot find refuge in their proposed alternate disposition of summary reversal because this is an "extraordinary remedy" not applicable to this case. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (per curiam) (Stevens, J., dissenting); Supp. 2 n.1. Summary reversal is not appropriate because the result below is correct and in any event is not "clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (per curiam)

(Marshall, J., dissenting). Summary reversal is reserved for clear errors, frequently of a constitutional dimension. *See, e.g.*, *Kirk v. Louisiana*, 536 U.S. 635, 635-36 (2002) (per curiam) (summarily reversing decision permitting warrantless entry, arrest, and search in violation of settled Court precedent).

CONCLUSION

Given the lack of a circuit split, Petitioners' waivers at trial and on appeal, and the correct result on appeal (including affirmance of a fact-bound jury verdict), this case does not raise a question warranting this Court's review. As advocated by the Government, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 17, 2003

No. 02-649

In the Supreme Court of the United States

DEE-K ENTERPRISES, INC. AND ASHEBORO ELASTICS CORPORATION, PETITIONERS

v.

HEVEAFIL SDN. BHD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether, in a case brought under the Sherman Act, 15 U.S.C. 1, alleging a global cartel organized outside the United States, the applicable jurisdictional test is governed by *McLain* v. *Real Estate Board*, 444 U.S. 232 (1980), or by *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), when one or more defendants made substantial sales in interstate commerce of goods subject to the conspiracy.

2. Whether, assuming that *Hartford Fire* applies, the question of the cartel's effects on domestic markets is a question for the jury.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. Although the court of appeals' decision applies the wrong test in concluding that the Sherman Act did not apply to the global price-fixing conspiracy in this case, the court's decision nontheless does not warrant this court's reviw in light of the insufficient development of the record below and the absence of any conflict in the circuits on the question presented.

STATEMENT

1. Petitioners are United States companies that purchase rubber thread, which is "used to make elastic fabric, bungee cords, toys, and other products." Pet.

App. 4a. In 1997, petitioners brought a class action against several producers of extruded rubber thread under Section 1 of the Sherman Act, 15 U.S.C. 1, seeking treble damages for overcharges they allegedly paid as a result of a price-fixing conspiracy. Petitioners named as defendants nine Malaysian, Indonesian, and Thai producers of rubber thread, four United States subsidiaries of Malaysian producers, and two United States independent distributors. After the district court denied class certification and "most defendants settled, declined to appear, or were dismissed," the case against the five Malaysian producers and the United States subsidiary of one of producers (Rubfil USA, Inc.) proceeded to an eight-day jury trial. Pet. App. 3a-5a.

Petitioners "introduced substantial evidence at trial of horizontal price fixing among the producers" during 1991-1996. Pet. App. 5a-6a. All of the price-fixing meetings occurred, and all of the rubber thread was produced, outside the United States. *Id.* at 6a. The conspiracy, however, was "aimed at a global market" including the United States. *Id.* at 10a. The Malaysian producers distributed rubber thread to the United States by (1) selling directly to larger American customers without using an intermediary; (2) selling to United States purchasers through an unincorporated, United States-division of respondent Heveafil Sdn. Bhd.; and (3) selling to domestic purchasers through wholly owned, United States-incorporated subsidiaries. *Id.* at 6a. Although the "record does not disclose the United States share of the global market," *ibid.*, respondents did not dispute petitioners' evidence that buyers in the United States purchased tens of millions of dollars' worth of rubber thread from the respondents during the conspiratorial period and that the United States division of one respondent (Heveafil Sdn. Bhd.)

sold over $7 million in rubber thread to customers in 31 States in one year. Pet. 4, 8-9.

The evidence at trial also showed that prices for rubber thread generally rose during 1991-1996. Petitioners contended that the price increases resulted from the conspiracy. Respondents argued, however, that the alleged price-fixing agreement was never implemented in the United States and that any increase in observed prices in the United States flowed from antidumping duties imposed by the Department of Commerce (pursuant to 19 U.S.C. 1673) and increases in the price of raw materials, particularly latex, used to manufacture rubber thread. Pet. App. 6a-7a.

The parties disputed the jury instructions concerning the jurisdictional reach of the Sherman Act. Respondents requested that the jury be required to find that the conspiracy had a "substantial effect" in the United States. Respondents relied on this Court's statement in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 (1993), that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." At trial, petitioners objected "to the use of the terms 'substantial effect' in any of the jury instructions." Pet. App. 36a. The district court denied petitioners' objection and submitted the following two questions to the jury:

> 1. Was there a conspiracy * * * to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States?
>
> 2. Did the conspiracy have a substantial effect in the United States?

C.A. App. 3665; Pet. App. 7a.

The jury answered the first question in the affirmative but the second question in the negative. The district court entered judgment for respondents. Pet. App. 7a.

2. Petitioners moved for a new trial pursuant to Federal Rule of Civil Procedure 59, arguing that the clear weight of the evidence was contrary to the jury's finding that respondents' conspiracy did not have a substantial effect on United States commerce. The district court denied the motion. Pet. App. 28a- 29a. The court reasoned that "[t]he *Hartford Fire* jury instructions were warranted and in accordance with the law." *Id.* at 29a. The court also found that the jury's finding that petitioners "failed to meet their burden" under *Hartford Fire* "is not against the clear weight of the evidence." *Ibid.*

The district court also denied petitioners' post-trial motion, pursuant to Federal Rule of Civil Procedure 50, that petitioners were entitled to judgment as a matter of law that the conspiracy had substantial domestic effects. Pet. App. 29a-30a. The district court denied the motion as untimely because petitioners had not moved for judgment as a matter of law at the close of evidence during the trial. *Ibid.*; see Fed. R. Civ. P. 50(a)(2) (requiring motion to "be made at any time before submission of the case to the jury").

3. The court of appeals affirmed. Pet. App. 1a-27a. It rejected petitioners' argument that the applicability of the Sherman Act to the respondents' conduct was governed by *McLain* v. *Real Estate Board*, 444 U.S. 232, 242 (1980), which held that, in antitrust cases involving *domestic* conduct, the Sherman Act applies if "the defendant's activity is itself in interstate commerce or, * * * has an effect on some other apprecia-

ble activity demonstrably in interstate commerce." The court of appeals held that, "[b]ecause the conspiracy involved primarily foreign conduct," the district court "did not abuse its discretion in applying the substantial-effect test" of *Hartford Fire*. Pet. App. 3a.

The court explained that, in determining whether to apply the jurisdictional test for foreign conduct under *Hartford Fire* or the jurisdictional test for domestic conduct under *McLain*, "a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic." Pet. App. 24a-25a. Applying that test to the facts of this case, the court of appeals concluded that "the price-fixing conspiracy [petitioners] alleged and proved was primarily 'foreign conduct' to which the *Hartford Fire* test properly applied." *Id.* at 27a. The court reasoned that "the bulk of the conduct * * * occurred abroad"; that "the agreements here were all formed entirely outside the United States"; that the "target of the conspiracy was a global market"; and that only two of the dozens of participants in the meetings held office in U.S. companies, and even those participants "also had important and in fact primary roles in Southeast Asian companies." *Id.* at 26a. The court further explained that, although respondents "sold rubber thread in the United States to United States consumers" and "a handful of faxes * * * describe pricing in the United States," those domestic "links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia (and around the world)." *Ibid.*

In a footnote, the court of appeals also rejected petitioners' challenge to the district court's denial of a motion for a new trial under Rule 59. Pet. App. 7a. The court of appeals explained that respondents "provided

the jury with a good deal of evidence supporting the challenged finding [of no substantial effect], including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." *Ibid.* The court accordingly concluded that "nothing about this case presents the 'exceptional circumstances' that might lead [the court] to conclude that the verdict was against the weight of the evidence." *Ibid.*

DISCUSSION

The court of appeals applied the wrong test in determining the jurisdictional reach of the Sherman Act in the context of a price-fixing conspiracy that involves both foreign and domestic elements. The relevant question is not whether such conspiracy involves "primarily foreign or primarily domestic" "participants, acts, targets, and effects," but rather, whether the conduct that allegedly injured the petitioners involves commerce within the reach of the Sherman Act. Notwithstanding the court of appeals' erroneous analysis, however, the decision does not merit this Court's plenary review. It does not conflict with any decision by another court of appeals regarding the scope of jurisdiction under the Sherman Act over a price-fixing conspiracy involving both foreign and domestic conduct. Moreover, relevant facts and arguments were not presented with sufficient clarity below to warrant this Court's review.

1. a. The threshold issue in determining whether the Sherman Act extends to cartel cases involving foreign activities is whether the conduct at issue involves domestic, import, or foreign commerce. The jurisdictional test for conduct involving domestic commerce is set forth in *McLain*, 444 U.S. at 242, which requires inter-

state activity or some more-than-minimal effect on interstate activity. The test for conduct involving non-import foreign commerce is set forth in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, which requires such foreign conduct to have a "direct, substantial, and reasonably foreseeable [domestic] effect" and that "such effect gives rise to a claim" under the Sherman Act.[1]

And the jurisdictional test for conduct involving import commerce is that discussed in *Hartford Fire*, 509 U.S. at 796, which requires intended and substantial domestic effects. *Hartford* cited with approval (*ibid.*) the Second Circuit's decision in *United States* v. *Aluminum Co. of America (Aloca)*, 148 F.2d 416, 444 (1945) (L. Hand, J.), which involved imports from Canada. The federal government's antitrust enforcement guidelines similarly reflect the view that allegations of conduct involving import commerce must meet the substantial effects test of *Hartford Fire*. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.1 (stating that *Hartford Fire* applies "[w]ith respect to foreign import commerce"), § 3.11 (stating that whether "[i]mports into the United States" "in fact produce the requisite substantial effects will depend on the facts of each case") (Apr. 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589 (1995).

As the court of appeals observed, this case alleges a conspiracy with "mixed foreign and domestic ele-

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[1] The United States agrees with the court of appeals (Pet. App. 11a) and the parties (Pet. 10 n.4; Br. in Opp. 21) that the FTAIA does not apply in this case because defendants' conduct at issue concerns import commerce and/or domestic commerce, which is expressly excluded from the reach of the FTAIA.

ments." Pet. App. 10a. The court of appeals held that, "[i]n determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are *primarily* foreign or *primarily* domestic." *Id.* at 24a-25a (emphasis added). Because the court of appeals found the conspiracy here to involve "primarily 'foreign conduct,'" the court held that "the *Hartford Fire* test properly applied." *Id.* at 27a. That analysis was erroneous. The relative or absolute amount of foreign activity is immaterial if the aspects of the conspiracy giving rise to the plaintiff's injury sufficiently affect domestic commerce,[2] *i.e.*, "the defendant's activity is itself in [domestic] interstate commerce, or * * * has an effect on some other appreciable activity demonstrably in [domestic] interstate commerce." *McLain*, 444 U.S. at 242. In other words, the relevant question is not a relative one, but rather whether there is a domestic commerce component of the case that justifies an instruction under *McLain*, regardless of the relative amount of import commerce or foreign activity involved in the conspiracy.

Moreover, a focus on whether the conduct at issue is primarily domestic or foreign erroneously suggests that a case must be placed in a single category. The alleged conduct at issue may involve significant domestic com-

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[2] Unlike the government, private plaintiffs must demonstrate standing by "show[ing] that the [conduct] caused them an injury for which the antitrust laws provide relief," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.7 (1986), and that the injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

merce as well as import and foreign commerce. In particular, the court of appeals' observation (Pet. App. 26a) that the domestic links in a given case may be "mere drops in the sea of conduct that occurred" outside the United States is troubling. That statement might be read to mean that the Sherman Act would extend to a $10 million, purely domestic price-fixing cartel, but not extend to the domestic conduct of the same cartel if it expands to involve foreign producers, foreign meetings, and foreign sales to make it a $100 million global cartel. Certainly, conspirators should not be able to immunize the domestic effects of a conspiracy by broadening the conspiracy to include foreign markets.

b. In this case, respondents' sales appear to fall into three categories: interstate sales, direct imports into the United States to domestic purchasers, and foreign sales to foreign purchasers. Pet. App. 6a, 10a. Moreover, the conduct that gives rise to the petitioners' alleged injuries is limited to the first two categories. Although the facts are not entirely clear, there may well have been a sufficient domestic commerce component in the case to justify an instruction under *McLain*. One respondent, Rubfil USA, Inc., is a United States-incorporated subsidiary of a Malaysian producer, and made interstate sales of rubber thread from its office in North Carolina. Another respondent, Heveafil Sdn. Bhd., maintained an unincorporated division in the United States, which also made interstate sales of rubber thread from its office in North Carolina. *Id.* at 6a, 26a. Although the jury made no finding on the extent of such sales, and the court of appeals did not mention any evidence of such sales, it appears from record evidence cited by petitioners (Pet. 4, 8-9)—and not disputed by respondents—that interstate sales

from the respondents' North Carolina offices totaled in the tens of millions of dollars. If so, that evidence would be sufficient to establish jurisdiction under *McLain*. See 444 U.S. at 242, 246; accord *Fortner Enters.* v. *U.S. Steel Corp.*, 394 U.S. 495, 501-502 (1969) ($190,000 sufficient commerce to establish jurisdiction).

2. Notwithstanding the court of appeals' improper analysis, the decision below does not merit this Court's plenary review. As the court of appeals observed, "our increasingly global economy will undoubtedly produce * * * cases with mixed fact patterns, defying ready categorization as 'foreign' or 'domestic' conduct." Pet. App. 25a. The decision below, however, represents the first appellate decision analyzing what jurisdictional test applies when a price-fixing conspiracy involves significant foreign and domestic elements.

Petitioners argue (Pet. 14-15) that this Court's review is warranted to resolve a conflict with the decision below and *Carpet Group International* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), and *United States* v. *Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998). However, there is no clear conflict. Neither decision addresses whether a plaintiff must show substantial domestic effects from a price-fixing conspiracy that involves primarily foreign conduct.

In *Carpet Group*, the Third Circuit rejected the defendants' contention that *Hartford Fire* requires a plaintiff to show substantial domestic effects from a boycott by a group of United States importer/wholesalers of oriental rugs against rug manufacturers that directly sold to United States retailers and the retailers that directly purchased from those manufacturers at domestic trade shows. 227 F.3d at 73-75. The court of appeals explained that "*McLain* controls when subject

matter jurisdiction over domestic conduct is at issue," rejecting the defendants' reliance on *Hartford Fire* "because it dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Id.* at 75.

Although the Third Circuit's description, in dicta, of *Hartford Fire* as addressing "wholly foreign conduct" is different than the characterization of the court below of *Hartford Fire* as involving some domestic elements (see Pet. App. 17a-18a), there is no clear conflict calling for this Court's review. The facts of *Carpet Group* and this case are sufficiently distinct that it is not at all clear that the court below would not have joined the Third Circuit in applying *McLain* to the facts of *Carpet Group*. Nor does *Carpet Group* suggest how the Third Circuit would address the conspiracy involved here. The court below noted that "the price-fixing conspiracy [petitioners] alleged and proved was primarily 'foreign conduct.'" *Id.* at 27a. By contrast, the Third Circuit in *Carpet Group* held that "[t]he instant case deals primarily with conduct *in the United States.*" 227 F.3d at 75 (emphasis added). The Third Circuit simply had no occasion to consider the appropriate jurisdictional test when the conspiracy at issue involves some domestic conduct but foreign conduct predominates.

Petitioners similarly err in relying on the statement by the First Circuit in *Nippon Paper* that "*Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States." 109 F.3d at 9. As that statement suggests, *Nippon Paper* considered a conspiracy involving "wholly foreign conduct." *Ibid.* Because in *Nippon Paper* "the price-fixing activities * * * took place *entirely*" overseas, *id.* at 2 (emphasis added), the First

Circuit's decision does not address the appropriate jurisdictional test when the illicit conspiracy has both foreign and domestic elements.

3. Additional considerations further counsel against granting review in this case. Although petitioners objected to the district court's instruction under *Hartford Fire*, Pet. App. 36a, petitioners did not articulate to the district court that, under *McLain*, the Sherman Act applied to the alleged conduct to the extent that it involves domestic commerce. Rather, petitioners proposed a jury instruction that was *inconsistent* with *McLain* and, as a practical matter, similar to the questions that the district court actually posed to the jury. Thus, petitioners requested that the jury be instructed that the Sherman Act applied in this case only upon a finding that respondents' conspiracy actually affected prices in the United States:

> **Interstate And Foreign Commerce**
>
> In order to violate the Sherman Act, the activities of the conspirators must affect products that move in interstate or foreign commerce. Interstate commerce may include transportation of products into and out of the U.S., or across state lines.
>
> In this case, the plaintiffs have presented evidence that the defendants and co-conspirators engaged in a conspiracy to raise, control, maintain, stabilize or fix the price levels of Extruded Rubber Thread imported from outside the United States. It is not disputed that such products move in or into interstate commerce. This means that if you find that there was a conspiracy *which affected the U.S. price levels of Extruded Rubber Thread*, then it is estab-

> lished that the conspiracy affected U.S. commerce and the Sherman Act applies.

Plaintiffs' Proposed Jury Instruction No. 36 (Mar. 13, 2001) (emphasis added) (C.A. App. 3663); accord Plaintiffs' Proposed Jury Instruction No. 37 (Feb. 12, 2001) (C.A. App. 3664).

That instruction is not a correct statement of the law. The "proper analysis focuses, not upon actual consequences [from a conspiracy], but rather upon the potential harm that would ensue if the conspiracy were successful." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991). In other words, proof of a conspiracy and jurisdictionally significant sales of the product are sufficient to establish jurisdiction, without regard to an effect on domestic prices.

Not only was petitioners' proposed instruction erroneous, its focus on the conspiracy's effects on prices in the United States was not materially different from the instruction actually given, which required proof that respondents' conspiracy substantially affected United States commerce. Nor is it clear that petitioners would have prevailed had the court instructed the jury as proposed by petitioners. The jury found that respondents conspired and had the intent to substantially affect United States commerce, but that respondents' conduct did not actually have those effects. In other words, the jury appears to have agreed with respondents' defense that the conspiracy either was never implemented or at least was not the cause of the observed price increases of rubber thread in the United States. Thus, the jury's verdict appears to reject petitioners' argument that the conspiracy actually affected price levels in the United States.

Petitioners' failure to request an appropriate instruction under which it would have prevailed counsels against review by this Court. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing a case as improvidently granted when "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested"); *United States* v. *Wells*, 519 U.S. 482, 488 (1997) ("we have treated an inconsistency between a party's request for a jury instruction and its position before this Court as just one of several considerations bearing on whether to decide a question on which we granted certiorari").

4. Petitioners also argue (Pet. 19-22) that, assuming *Hartford Fire* sets forth the relevant jurisdictional inquiry, the district court erred by submitting to the jury the issue of whether the conspiracy had the requisite substantial domestic effects, rather than deciding the matter itself as a matter of law. That question is not properly before this Court, as it was neither raised nor passed on below. Petitioners never argued that the issue of substantial effects should have not have been submitted to the jury. Rather, petitioners argued that the jury need not find "substantial" domestic effects, but only effects on domestic prices. Moreover, petitioners did not make a timely request under Rule 50 to the district court to decide the substantial effect question as a matter of law, Pet. App. 29a- 30a, and petitioners did not appeal the denial of their Rule 50 motion, *id.* at 7a & n.1.

Finally, even were the issue properly presented, this case would not be a suitable vehicle to determine how to satisfy the "substantial effects" test under *Hartford Fire*. As discussed, it is far from clear that a *Hartford Fire* instruction was necessary in this case in light of

the apparently significant domestic commerce involved. And, in any event, petitioners do not point to any appellate decision addressing what effects must be shown under *Hartford Fire*. Indeed, the court of appeals did not purport to define what constitutes a "substantial effect" under *Hartford Fire*, but rather found that, in this particular case, the jury's finding was not against the weight of the evidence. Pet. App. 7a n.1. Review of that fact-bound conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States
October Term, 2002

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,

Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BY THE AMERICAN ANTITRUST INSTITUTE TO OBJECTION TO THE MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Respondents have opposed the motion for leave to file an amicus brief by the American Antitrust Institute ("AAI") baselessly asserting that the AAI's amicus brief contributes nothing to the case. AAI believes that respondents' opposition has no merit and warrants only a brief response.

It is hornbook law that this Court routinely grants motions for leave to file amicus briefs. *See, e.g.*, Robert L. Stern & Euguene Gressman, *Supreme Court Practice*, § 6.04 at 466 (2002 ed.). Simply because they disagree with the views expressed in the AAI's amicus brief, respondents seek to give the brief no weight. But this Court should give considerable weight to the AAI's amicus brief. Among those sitting on the American Antitrust Institute's Advisory Board are four former Assistant Attorneys General for the Antitrust Division of the United

States Department of Justice and numerous distinguished private practitioners. As a non-profit, education and research institute concerned with the integrity of antitrust enforcement, the AAI possesses a collective independent judgment and experience on antitrust matters -- including the question presented here -- that the private parties opposing each other in this case simply do not possess.

Respondents also contend that the AAI's amicus brief should not be considered by this Court because, according to respondents, the AAI's brief is "duplicative" of the points made in the petition for certiorari. That is not true. AAI's amicus brief devotes an entire section to the importance of the question presented here including numerous references to speeches from the Assistant Attorneys General for the Antitrust Division in addition to citations to briefs filed by the United States government in cases addressing the very subject at issue here. None of this highly relevant and informative material appears anywhere in the petition for certiorari. Moreover, despite respondents' protestations to the contrary, AAI's amicus brief does not present precisely the same conflict as the petition for certiorari. The AAI views the conflict among the circuits in starker terms than petitioners. As the AAI's amicus brief explains, the Fourth Circuit essentially acknowledged the conflict with the Third Circuit in *Carpet Group*. The Fourth Circuit's half-hearted efforts to distinguish *Carpet Group* fell far short.

Finally, the AAI's amicus brief brings to the forefront several important points nowhere addressed in the petition for certiorari: namely, that the Fourth Circuit's decision seriously undermines the bedrock principle that the antitrust laws are designed to protect U.S. consumer welfare, that the Fourth Circuit's decision resurrects a flawed "balancing" analysis of a type this

Court rejected in *Hartford Fire*, and that the Fourth Circuit's decision is out-of-step with the views of the federal government antitrust enforcement agencies. *See* Amicus Br. at 7-12.

CONCLUSION

For the reasons stated herein, and for the reasons in the Motion For Leave To File Brief For The American Antitrust Institute As Amicus Curiae In Support Of Petitioner, this Court should grant the motion.

Respectfully submitted.

Robert A. Skitol by DG

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December 11, 2002

No. 02-649

In the Supreme Court of the United States

October Term, 2002

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,

Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CERTIFICATE OF SERVICE

On this 11th day of December 2002, I certify that a true and correct copy of the Reply By The American Antitrust Institute To Objection To The Motion For Leave To File Brief As Amicus Curiae was served in the above-captioned case upon counsel of record for Petitioners and Respondents via first-class U.S. mail, postage prepaid, to the following address:

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December 11, 2002

Via First-Class Mail
William K. Suter
Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RE: *Dee-K Enterprises, Inc. and Asheboro Elastics Corp. v. Heveafil SDN BHD. et al., No. 02-649*

Dear Mr. Suter:

Enclosed please find the original and eleven copies (11) of the Reply By The American Antitrust Institute To Objection To The Motion For Leave To File Brief As Amicus Curiae. Please date-stamp the extra copy and return it to us in the enclosed self-addressed envelope.

Sincerely yours,

David A.J. Goldfine

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No. 02-649

Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,

Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OBJECTION TO THE MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.5 of the Rules of this Court, Respondents Heveafil Sdn. Bhd. and Filmax Sdn. Bhd. ("Respondents") object to the Motion for Leave to File Brief as Amicus Curiae ("Motion") by the American Antitrust Institute ("Movant"). Both of Movant's arguments simply restate points made by Petitioners, and for that reason the Motion should be denied. Sup. Ct. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."); *see also* Sup. Ct. R. 37.2(b) (providing that motions for leave to file amicus briefs are "not favored").

Movant's Arguments Simply Restate Points Made by Petitioners.

When counsel for Movant requested Respondents' consent to file a brief as amicus curiae, Respondents' undersigned counsel requested a copy of Movant's draft brief to ensure that

Respondents would not be consenting to a duplicative amicus brief in contravention of Rule 37.1. Movant's counsel declined to provide a draft; accordingly, Respondents declined Movant's request for consent.

Validating Respondents' concern about redundancy, Movant's brief fails to make any points not already made by Petitioners. Movant's first argument is that this case presents an important question because the Fourth Circuit's opinion will hamper government enforcement efforts. Petitioners devoted an entire section of their Petition to the same argument. Pet. 17-19. Movant's second argument is that the Fourth Circuit's decision conflicts with the Third Circuit's in *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000). Again, Petitioners devoted an entire section of their Petition to that argument. Pet. 14-17. This redundancy persists for each of the numbered sub-points in Movant's second argument, each of which is also made in the Petition. Movant's brief, therefore, fails to serve the purpose for which amicus briefs are intended: to inform the Court about matters not addressed by the parties. Instead, Movant's duplicative brief will merely burden the Court.

Respectfully submitted,

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